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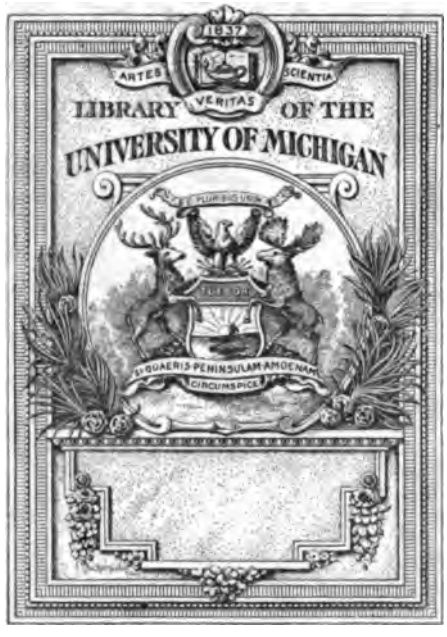
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THE

ATY-MAKING POWER

OF THE

UNITED STATES

BY

CHARLES HENRY BUTLER

OF THE NEW YORK BAR

VOL. II.

JUDICIAL DECISIONS AFFECTING THE TREATY-MAKING POWER OF THE UNITED STATES, ITS EXTENT AND APPLICATION

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§ 319. **Subject reviewed thus far from historical and not from judicial standpoint.**—So far the treaty-making power of the United States has been reviewed from historical and extra-judicial standpoints and not from the record of decisions of the courts. In deciding the extent and scope of that power the Federal and State courts have considered all of these historical points and, undoubtedly, have rendered their decisions in the light which history throws upon the subject; the opinions, however, of publicists, legislators, and even of framers of the instrument itself, have not always been adopted as the views of the courts.

§ 320. **Views of members of Constitutional Convention not always followed by courts.**—Even the views of those authors of the Federalist who participated so prominently in framing, and procuring the adoption of, the Constitution, have not always been accepted by the courts as the exact interpretation of the instrument which they themselves had assisted in framing;[1] in this respect, it must be borne in mind that the interpretation of instruments framed by conventions necessarily depends upon the exact wording *finally*

§ 320.

[1] See Alexander Hamilton's views as expressed in No. LXXV of The Federalist and comment thereon in § 247, p. 384, Vol. I, and § 313, p. 449, Vol. 1.

adopted, and not upon the personal views, of the meaning thereof, of any members of the convention. This rule applies, not only to opinions subsequently expressed but also, in a large measure, to opinions expressed in the convention, although courts have decided that the record of debates may, to some extent, be taken into consideration in deciding the effect of a statute or resolution.

In every convention antagonistic views exist on almost every subject. In construing the meaning of terms used to express the opinion of the body as finally adopted, the court must take into consideration the fact that many members must have voted without expressing their views and that they cannot be considered as having acquiesced in anything beyond the exact terms used; the interpretation therefore of all clauses must necessarily rest with the court as it is derived from the language itself in the final form adopted, and the court cannot be bound to interpret any clause in any instrument in accordance with the views contemporaneously or subsequently expressed either verbally or in writing by one or several members of the body adopting it.[2]

[2] *Pollock* vs. *Farmers' Loan & Trust Co.*, U. S. Sup. Ct. 1895, 157 U. S. 429, FULLER, Ch. J. In this case (pp. 556–574) the debates of the Constitutional Convention are reviewed for the purpose of arriving at what the expressions direct and indirect taxes meant. The conclusion reached is stated on pp. 573–574 as follows:

"From the foregoing (review of debates and decisions) it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. That under the state systems of taxation all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes. 3. That the rules of apportionment and of uniformity were adopted in view of that distinction and those systems. 4. (Referring to the *Hylton Carriage* case) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise. 5. That the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies. . . ."

See also *Field* vs. *Clark*, U. S. Sup. Ct. 1892, 143 U. S. 649, HARLAN, J., in which the effect of the entries in the Journal of the Houses of Congress is considered.

In speaking of the debate in Congress in regard to the purchase of Louisiana, the Supreme Court says: "It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessi-

§ 321. **Construction and effect of Constitutional provisions to be determined by courts; President Jackson's views as to personal construction.**—The construction of Article VI, of the Constitution of the United States, therefore, together with all other cognate clauses must be accepted only as it has been finally construed and become binding upon all the courts of the country, both Federal and State, as well as upon the various Departments of the Government. President Jackson, indeed, declared that it was the duty of each officer of the United States to interpret the Constitution according to his own conscience and to act according;[1] that theory, however, might possibly lead to confusing, even disastrous, results, and at the present time, it can hardly

ties of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts. *U. S.* vs. *Un. Pac. R. R. Co.*, 91 U. S. 72, p. 79." Opinion of Mr. Justice BROWN in *Downes* vs. *Bidwell* (*Insular Cases*), U. S. Sup. Ct. May, 1901, 182 U. S. 244.

The rule is stated in Black on Interpretation of Laws, Hornbook Series, St. Paul, 1896, as follows, on page 28, in regard to "extraneous aids in construction of constitutions. If an ambiguity exists which cannot be cleared up by a consideration of the constitution itself, then, in order to determine its meaning and purpose, resort may be had to extraneous facts, such as the prior state of the law, the evil to be remedied, the circumstances of contemporary history or the discussions of the Constitutional Convention." In regard to the last point he cites on page 30 numerous authorities, Dwarris on Statutes; and Endlich on Interpretation of Statutes, sec. 510, in which that author declares that it is a great stretch of principle but on the whole sanctioned by judicial authority.

The rules as stated by Black in regard to legislative debate on pages 224–230 are summarized in the captions as follows:

"91. In aid of the interpretation of an ambiguous statute, or one which is susceptible of several different constructions, it is proper for the courts to study the history of the bill in its progress through the legislature, by examining the legislature journals.

"92. Opinions of individual members of the legislature which passed a statute, expressed by them in debate or otherwise, as to the meaning, scope, or effect of the act, cannot be accepted by the courts as authority on the question of its interpretation, and if received at all are entitled to but little weight.

"93. In the interpretation of statutes, it is not proper or permissible to inquire into the motives which influenced the legislative body, except in so far as such motives are disclosed by the statute itself."

§ 321.

[1] President Jackson's "Protest"

ren the subject of discussion, that no matter what indi-
al views or conscientious scruples any officer of the
rnment, administrative or judicial, may have, he must
rdinate them, in the performance of his duties, to the de-
is of the judicial department of the Government, and he
nly fulfill the obligation of his oath to support the Con-
ion of the United States by doing so in accordance with
nes which have been established by the Federal Courts
t resort.

22. **Views of publicists and courts as to extent and of treaty-making power.**—In this chapter we purpose large upon the opinion expressed in the introduction to olume as to the great extent of the treaty-making power e United States, and to show the manner in which the itutional provisions affecting treaties have been con- l and interpreted, by the Supreme Court of the United s; and not only that all of the Federal Courts, which course bound to do so, have followed these decisions, hat the construction of the law, as expressed by the st Federal tribunal, has been unanimously accepted as w of the land by the courts of last resort of many of tates; that in so doing they have accepted it, not be- they have been forced so to do, but, because they have nized the reasonableness of the proposition, as well as eat benefits which have inured to the States themselves result of empowering the Central Government to act exclusive, and fully authorized, agent of the several in determining the relations of the United States with n powers.

23. **Treaty-making power to be considered as to scope xtent, effect on State legislation, and relative effect aties and Congressional statutes.**—The subject can ly be considered in three aspects. *First*, the scope of aty-making power as vested in the United States and ermined by the Federal Courts; *second*, the superiority ty stipulations as to all conflicting State legislation, past, present or future; *third*, the relative effect of s and Congressional legislation.

5, 1834, Richardson's Mes- f the Presidents, vol. III, pp. 69, *et seq.* See p. 71.

The first subdivision has been the subject of preceding chapters, but it will also be referred to in subsequent chapters; the third subdivision will be reserved for a separate consideration in the next chapter; the second subdivision will be the subject-matter of this chapter which will be devoted to revewing the decisions of the courts in cases which have involved the relative effect of treaty provisions and State statutes.

§ 324. **First important treaty case; Ware vs. Hylton.** —The first important cases involving treaties and the treaty-making power which reached the Supreme Court did not relate to a treaty made by the President and ratified by the Senate under the Constitution, but one which had been made under the Confederation—the Definitive Treaty of Peace of 1783 with Great Britain; the point involved was how far did that treaty override State statutes in regard to the collection and confiscation of ante bellum debts owed by Americans to citizens of Great Britain.

In *Ware* vs. *Hylton*,[1] a British subject sued citizens of Virginia, on a debt contracted prior to the war; the debtors pleaded, amongst other things, abrogation of the debt by war, confiscation of the debt by the State of Virginia as a war measure, and also a partial payment to the State as owner of the debt by confiscation; the plaintiff replied, setting up the Definitive Treaty of Peace of 1783 and the ratification thereof by Article VI of the Constitution of the United States, making it the supreme law of the land, and, therefore, paramount to all State legislation past and future. Thus at the very outset of the operation of constitutional power, a direct conflict arose between State sovereignty and the right of the Federal Government to modify State laws under the treaty-making power.

§ 325. **Far-reaching effect of decision in Ware vs. Hylton; five opinions delivered.** —Nearly two hundred pages of the third volume of Dallas's Reports are devoted to the record of this case: five of the seven Justices delivered separate opinions and many of the prominent lawyers of

§ 324.

[1] *Ware* vs. *Hylton*, U. S. Sup. Ct. 1796, 3 Dallas, 199. For extracts from opinions delivered in this case, see §§ 325 *et seq. post.*

day appeared as counsel. Justices Chase, Patterson, lson and Cushing all concurred in reversing the judg- ıt of the lower court, which had dismissed the bill; tice Iredell, who had heard the case below as Circuit lge, delivered the only dissenting opinion. The opin- ı in this case alone, had they never been cited and ap- ved in subsequent decisions, would be sufficient to justify Commissioners, concluding a treaty for the United States, naking whatever absolute stipulations might, in their ıion, be necessary and proper in order to gain any de- d results, and in regard to any matters, whether exclu- ly within the control of the States or not; and clothe the tral Government with ample power to enter into, and ›rce, all such treaty stipulations.[1]

. few extracts from the opinions which apply directly to subject under discussion, will remove all doubt as to eral jurisdiction and power in such cases.

326. **Opinions of Justices Chase and Paterson.**[1]—Mr. ;ice Chase in his opinion shows that the whole question ıat "the *only impediment* to the recovery of the debt uestion is, the *law* of *Virginia*, and the payment under ınd the treaty relates to *every kind of legal impediment.* it is asked, did the fourth article intend to *annul* a *law* he states? and destroy rights acquired under it? I an- r, that the fourth article did intend to destroy *all lawful ediments, past and future;* and that the law of *Virginia*, the payment under it, is a lawful impediment; and would a recovery, if not destroyed by this article of the treaty.

. Our Federal Constitution establishes the power of ıaty over the constitution and laws of any of the States; I have shown that the words of the fourth article were ıded, and are sufficient to nullify the *law* of *Virginia*, the payment under it."[2]

r. Justice Paterson concluded his opinion with the

25.
he articles of the treaty in- d in this action and which re- to the collection of debts due citizens of the one county to ıns of the other, are quoted at length in note to § 159, p. 277, Vol. I.

§ 326.

[1] 3 Dallas p. 242; italics are so in the original.

[2] *Idem*, p. 244.

statement that the clause in the treaty under consideration deserved the utmost latitude of exposition, saying:

"The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of *Virginia*, which has been pleaded in bar, and with regard to the creditor annuls everything done under it."[3]

§ 327. **Opinions of Justices Wilson and Cushing.**—Mr. Justice Wilson devotes one half of a concise opinion of less than a page to the point under consideration, and says:

"Even if *Virginia* had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but is extended to debts *heretofore contracted*. It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the Constitution of the *United States*, (which authoritatively inculcates the obligation of contracts) the treaty is sufficient to remove every impediment founded on the law of *Virginia*. . . . The State was a party to the making of the treaty; a law does nothing more than express the will of a nation; and a treaty does the same."[1]

Justice Cushing, who was the last member of the Court to deliver an opinion, disposes of this element of the case as follows: "The State may make what rules it pleases, and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference.[2] . . . To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the constitution of the *United States*, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the Constitution itself; and certainly, with any law whatsoever."[3]

[3] *Idem*, p. 256. § 327.
[1] 3 Dallas, p. 281.
[2] *Idem*, p. 282.
[3] *Idem*, p. 284.

328. **Justice Iredell's dissenting opinion.**—Justice Ire- dissented from the final result reached by the Court; he not base his dissent, however, upon any lack of power in Central Government to bind the States; in regard to the ty-making power he used these words:

I consider the treaty, (speaking generally, independent he particular provisions on the subject, in our present stitution, the effect of which I shall afterwards observe ı) as a solemn promise by the whole nation, that such such things shall be done, or that such and such rights l be enjoyed."[1]

lthough this opinion dissented as to the general result, it ains a strong exposition of the right of the United States ake treaties in regard to State matters. Justice Iredell ared that the Confederation did not have the power nec- y to enforce the treaty of 1783, and expressed as his ion, that a British creditor could not have maintained a under the treaty of 1783 in any State where an impedi- t existed by reason of a State act *before the present Con- tion of the United States had been formed;* he made the wing statement, which he gave as his reason for the exist- of Article VI of the Constitution:

The article in the constitution concerning treaties I have ys considered, and do now consider, was in consequence e conflict of opinions I have mentioned on the subject of treaty in question. It was found in this instance, as in r others, that when thirteen different legislatures were sary to act in union on many occasions, it was in vain pect that they would always agree to act as Congress t think it their duty to require. . . . The *right and r* being separated, it was found often impracticable to) them act in conjunction. . . . Similar embarrass- s had been found about the treaty. This was binding *ral obligation*, but could not be constitutionally carried effect (at least in the opinion of many,) so far as the acts gislation then in being constituted an impediment, but repeal. The extreme inconvenience felt from such a m dictated the remedy which the Constitution has now

[1] 8.
Dallas, p. 271.

provided. . . . Under this Constitution therefore, so far as a treaty constitutionally is binding, upon the principles of *moral obligation*, it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the *supreme law* in the new sense provided, and it was so before in a *moral sense*."[2]

§ 329. **John Marshall's defeat; personnel of the court.** —The fact that this decision was delivered over a century ago makes it all the more authoritative, as the justices who announced it had the advantage of contemporaneous knowledge of many matters affecting the subject-matter involved and circumstances affecting it.[1] It was before the advent of the great Marshall upon the bench; but he appeared as one of the counsel, and, although he represented the defense, he did not dare to deny the great force and far-reaching effect of that treaty-making power of the United States which subsequently, as Chief Justice, he upheld so strenuously and efficiently. It is interesting at this time to note the fact that this was the only occasion on which John Marshall appeared *as counsel before* the Supreme Court; it is also interesting to note that on this single occasion he was unsuccessful.

Justice Paterson had been a member of the Constitutional Convention, and, as we have already seen, largely instrumental in strengthening the treaty-making power of the Federal Government. Justice Wilson had been a member of Congress, a signer of the Declaration of Independence, and was one of the ablest and most active members of the Federal Convention,[2] as well as that of his own State of Pennsylvania in which he was the acknowledged leader of the majority which ratified the instrument in spite of the opposition which was based to such a large degree, as we have seen, on the extent of the treaty-making power lodged in the Central Government. Justice Iredell had been a mem-

[2] 3 Dallas, pp. 276-277.

§ 329.

[1] For Justice Story's opinion as to the qualifications of the members of the Supreme Court, see note under § 143, pp. 246-247, Vol. I.

[2] For the part taken by Justice Wilson in the Federal Convention see § 182, p. 314, Vol. I; for the part which he took in the Pennsylvania State Convention, see § 199, p. 341, Vol. I.

· of the Constitutional Convention of North Carolina,[3] l was also the author of the reply to Colonel Mason's ob- tions to the Constitution.[4] The Chief Justice of the Court s one of the authors of the Federalist.[5]

; 330. **Ware vs. Hylton the leading authority for over entury.**—Although the opinions in this case were deliv- d over one hundred and four years ago, they are as much law of the land to-day as they were then; as an exposi- ı of the Constitutional treaty-making power of the United tes they have never been questioned; on the contrary, y have frequently been cited affirmatively and followed the courts of the States and of the United States, includ- the Supreme Court itself, which has on more than one ısion made them the basis of its decisions in regard to construction of treaties, not only in respect to this ele- ıt but also as to other points of treaty and Constitutional ɜtruction involved.

: any one considers that too much space has been devoted his single expression of the Supreme Court, the author only state that in his opinion the entire law of the treaty- ing power so far as the points involved are concerned, been summed up in the extracts which have been quoted ı the opinions delivered in this case, which according to Centennial historian of the Supreme Court, is one of the t far-reaching decisions rendered by that tribunal dur- the first century of its existence.[1] Other decisions were

ɜe § 227, p. 366, Vol. I.
ɜe § 253, p. 389, Vol. I.
ɜe § 249, p. 387, Vol. I.
30.
tate of Georgia vs. *Brailsford*, Sup. Ct. 1794, 3 Dallas, 1, JAY, J., involved similar ques- to those involved in *Ware* vs. *n.*
. Carson, the historian of the ɜme Court, in his Centennial ɔry, on page 169, after refer- ɔ the case of the *State of ɲia* vs. *Brailsford*, says:
'his decision, although not rately expressed, involved the important principle that the Treaty of Peace, like the Constitution, was in respect to matters embraced by its terms, the supreme law, and could not be restricted in its operation by State action or State laws. The same result was reached, and the same conclusion justified after the most exhaustive examination in the far more celebrated case of *Ware* vs. *Hylton*, in which the splendid eloquence of Patrick Henry, the great reasoning faculties of John Marshall at the bar, and the powerful dissenting opinion of Iredell were employed in

rendered involving similar questions but this was the leading case and established the legal principles involved.[2]

vain to convince the Court that Congress had no power to make a treaty that could operate to annul a legislative act of any of the States, and thus destroy rights acquired under such an act. Chase, Patterson, Wilson and Cushing, impressed by the uncommon magnitude of the subject, the bitter and exciting controversies it had provoked, and the far-reaching consequences by which their decision would be attended, although differing upon some matters of detail and in the mode of their reasoning, reached the conclusion that the Treaty of 1783 was the supreme law, equal in its effect to the Constitution itself, in overruling all State laws upon the subject, and the words that British creditors should meet with no lawful inpediment, were as strong as the wit of man could devise to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way by any law, particularly pointed against the recovery of such debts. The decision expanded from a statement of the contractual liability of an individual to an assertion that the treaty obligations of the nation were paramount to the laws of the individual States. Happy conclusion! A contrary result would have blackened our character, at the very outset of our career as a nation, with the guilt of treachery to the terms of the treaty by which our Independence had been recognized, and would have prostrated the national sovereignty at the feet of Virginia."

[2] *Clarke* vs. *Harwood*, U. S. Sup. Ct. 1797, 3 Dallas, 342, PER CURIAM.

This case involved similar questions as to those decided in *Ware* vs. *Hylton* and was decided in the same manner and without opinion.

Society for the Propagation of the Gospel vs. *Hartland*, U. S. Cir. Ct. Vermont, 1814, 2 Paine, 536; Federal Cases 13, 155; THOMPSON, J.

Same vs. *Wheeler*, U. S. Cir. Ct. New Hampshire, 1814, 2 Matthews, 105; Federal Cases 13, 156; STORY, J.

State of Vermont vs. *Society for the Propagation of the Gospel*, U. S. Cir. Ct. Vermont, 1826, Federal Cases 16, 919–20; THOMPSON, J.

Society &c. vs. *Town of New Haven*, United States Sup. Ct. 1823; 8 Wheat. 464; WASHINGTON, J.

These cases were all the result of State confiscation acts of property owned by the British Society; the Supreme Court held that the society had a right to hold the property, and that its rights became vested under the treaty of 1783, the provisions of which were superior to State laws; also that although these suits were not brought until after the War of 1812, the rights had become so vested under prior treaties that the Society had a right to recover and hold its property. It was also held that a State cannot pass laws confiscating franchises. There is quite a lengthy discussion in the opinion as to the effect of war upon treaties. In *Society for the Propagation &c.* vs. *Pawlett*, U. S. Sup. Ct. 1830, 4 Peters, 480, STORY, J., it was held, however, that the Society could not recover mesne profits during the period of confiscation.

Higginson vs. *Mein*, U. S. Sup. Ct. 1808, 4 Cranch, 415, MARSHALL, J. In a foreclosure case *held* that the

331. **Fairfax vs. Hunter; Justice Story's opinion; State law and treaties, 1812.**—The case of *Fairfax's Devisee* vs. *Hunter's Lessee*, an action in ejectment involving the construction of the treaties of 1783 and 1794 between Great Britain and the United States, was decided by the Supreme Court in 1812. In this case Justice Story, who delivered the opinion, declared that, as the possession and seizin of the property had continued up to and after 1794, the treaty of that year being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected them from forfeiture; he concludes that portion of his opinion which deals with this aspect of the case by saying:

"It was once in the power of the commonwealth of Virginia, by an inquest of office, or its equivalent, to have vested the estate completely in itself or its grantees. But it has not so done, and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty become ineffectual and void. It becomes unnecessary to consider the argument as to the effect of the death of one of the parties during the suit; because admitting it to be correctly applied in general, the treaty of 1794 completely avoids it."[1]

confiscation and sale of the property under confiscation laws of the State of Georgia, did not affect the title as the sale did not take place until after the treaty of peace, and that the statute of limitations could not be pleaded.

See also *Hamilton* vs. *Eaton*, U. S. Cir. Ct. No. Car. 1792, 1 Hughes, 249; Fed. Cas. 5980, ELLSWORTH, CH. J., SITGREAVES, J.

Hylton vs. *Brown*, U. S. Cir. Ct. Pa. 1806, 1 Washington, 298, 343, Fed. Cas. 6982, WASHINGTON, J.

Jones vs. *Walker*, U. S. Cir. Ct. Va. 1803, 2 Paine, 688, JAY, CH. J.

These are but a few of the early decisions on this subject; all the cases cited under the subsequent sections of this chapter should be carefully examined.

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[1] *Fairfax* vs. *Hunter*, U. S. Sup. Ct. 1813, 7 Cranch, 603 (see p. 627), STORY, J., and see also *Martin* vs. *Hunter*, U. S. Sup. Ct. 1816, 1 Wheaton, 304, STORY, J.

Orr vs. *Hodgson*, U. S. Sup. Ct. 1819, 4 Wheaton, 453, STORY, J.

Shanks vs. *Dupont*, U. S. Sup. Ct. 1830, 3 Peters, 242, STORY, J. The effect of the treaty of peace with Great Britain discussed and determined.

Hopkirk vs. *Bell*, U. S. Sup. Ct. 1806-7, 3 Cranch, 453, 4 Cranch, 163. American debtors set up the Virginia State statute of limitations as a bar to recovery of debts of British creditors.

Held, that under the provisions of the treaties of 1783, 1794 and

§ 332. **Chirac vs. Chirac; Chief Justice Marshall's opinion, 1817.**—During the existence of the French treaty of

1802, a State statute of limitations was not a bar to recovery.

Craig vs. *Radford*, U. S. Sup. Ct., 1818, 3 Wheaton, 594, WASHINGTON, J.

Held, that a British subject was protected in his title to lands in Virginia under the treaty of 1794 notwithstanding State laws and regulations as to aliens. Following *Fairfax* vs. *Hunter*, 7 Cranch, 603, the opinion says on page 599:

"The last objection made to this decree is, that as a British subject, Wm. Sutherland could not take a legal title to this land under the State of Virginia, and, consequently, that the grant to him in 1788 was void, and was not protected by the treaty of 1794 between the United States and Great Britain.

"The decision of this court in the case of *Fairfax's Devisee* vs. *Hunter's Lessee*, (7 Cranch, 603), affords a full answer to this objection. In that case the will of Lord Fairfax took effect in the year 1781, during the war, and Denny Martin, the devisee under that will, was found to be a native born British subject who had never become a citizen of any of the United States, but had always resided in England.

"It was ruled in that case, 1st. That although the devisee was an alien enemy at the time of the testator's death, yet he took an estate in fee under the will, which could not, on the ground of alienage, be devested but by inquest of office, or by some legislative act equivalent thereto. 2d. That the defeasible title thus vested in the alien devisee was completely protected and confirmed by the ninth article of the treaty of 1794.

"These principles are decisive of the objection now under consideration. In that case, as in this, the legal title vested in the alien by purchase during the war, and was not devested by any act of Virginia, prior to the treaty of 1794, which rendered their estates absolute and indefeasible."

Hughes vs. *Edwards*, U. S. Sup. Ct. 1824, 9 Wheaton, 489, WASHINGTON, J. A decree of foreclosure and sale affirmed by the Supreme Court notwithstanding the objection that the holder of the mortgage was an alien, the court holding that the mortgagee was protected in his rights by the provisions of the treaty of 1794. The opinion says, at p. 496:

"2. The next objection relied upon is the alienage of the respondents. This objection would not, we think, avail the appellants, even if the object of this suit was the recovery of the land itself, since the remedies as well as the rights of these aliens, are completely protected by the treaty of 1794, which declares 'that British subjects, who now hold lands in the territories of the United States, etc., shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as respect the said lands, and the legal remedies incident thereto, be regarded as aliens.' In the cases

'8[1] a Frenchman died intestate, seized of certain real es-
e in Maryland, which he had acquired after naturaliza-
ı; as his only heirs were French citizens the State of
ryland claimed that the lands were escheatable, and pur-
nt to some arrangement conveyed them to a natural son
he deceased who resided in this country. The legitimate
rs brought suit against the grantee of the State, who an-
ıred that they could not claim the property in view of
anti-alien laws, then existing in the State of Maryland.
: State of Maryland had passed an act permitting the lands
. French subject to descend to his next of kin, provided
y should be conveyed to a citizen of Maryland within ten
rs. The heirs of Chirac pleaded the treaty, claiming that
y could inherit regardless of State laws and that notwith-
ıding the subsequent abrogation of the treaty they were
compelled to convey the property to a citizen within ten
rs. The Supreme Court sustained their contention; in af-
ıing the judgment of the lower court below Chief Justice
shall, referring to the effects of the treaty, said as follows:

Iarden vs. *Fisher*, (1 Wheat. 300,) and *Orr* vs. *Hodgson*, (4 at. Rep. 453,) it was decided under this treaty, it was not ısary for the alien to show that as in the actual possession or n of the land, at the time of reaty; because the treaty ap- to the title, whatever that be, and gives it the same legal ity as if the parties were citi- "

·don vs. *Kerr*, U. S. Cir. Ct. a. 1806, 1 Washington, C. C. Fed. Cas. 5611, WASHINGTON, ıd see extract under § 354 of hapter, p. 47, *post*.

to when stipulations in the h treaty did not affect State see *Blight* vs. *Rochester*, U. S. Ct. 7 Wheaton, 535, MAR-L, Ch. J., 1822.

ver vs. *Jackson*, U. S. Sup. 30, 4 Peters, 1, STORY, J.

wn vs. *Sprague*, N. Y. Sup. Ct. 1848, 5 Denio, 545, BEARDSLEY, Ch. J.

Fox vs. *Southack*, Sup. Ct. Mass. 1815, 12 Mass. 143, JACKSON, J.

§ 332.

[1] Treaty of Amity and Commerce, between the Most Christian King and the thirteen United States of North America, concluded February 6, 1778, Ratified by the Continental Congress, May 4, 1778, U. S. Treaties and Conventions, edition 1889, p. 296.

The full text of Article XI (p. 297) is as follows: "The subjects, people and inhabitants of the said United States, or any one of them, shall not be reputed *aubains* in France, and consequently shall be exempted from the *droit d' aubaine*, or other similar duty, under what name soever. They may by testament, donation or otherwise, dispose of their goods, movable and immovable, in favor of such per-

"It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declares that 'The subjects and inhabitants of the United States, or any one of them, shall not be reputed *aubains* (that is *aliens*) in France.' 'They may, by testament, donation, or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization. The subjects of the most christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article.'[2]

sons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretexts of any rights or prerogative of provinces, cities or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called *droit detraction*, or other duty of the same kind, saving nevertheless the local rights or duties as much and as long as similar ones are not established by the United States, or any of them. The subjects of the most Christian King shall enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article, but it is at the same time agreed that its contents shall not affect the laws made, or that may be made hereafter in France against emigrations which shall remain in all their force and vigor, and the United States on their part, or any of them, shall be at liberty to enact such laws relative to that matter as to them shall seem proper."

[2] *Chirac* vs. *Chirac*, U. S. Sup. Ct. 1817, 2 Wheaton, 259, MARSHALL, CH. J. The extracts quoted from the opinion will be found at p. 270 and p. 277. See also

Dawsons' Lessee vs. *Godfrey*, U. S. Sup. Ct. 1808, 4 Cranch, 321, JOHNSON, J.

In this case it was *held*, as stated in the syllabus, that a person born in England before the year 1775 and who always resided there, and was never in the United States, was an alien, and could not in the year 1793 take lands in Maryland by descent from a citizen of the United States.

Owings vs. *Norwood's Lessee*, U. S. Sup. Ct. 1809, 5 Cranch, 344, MARSHALL, Ch. J.

Smith vs. *State of Maryland*, U. S. Sup. Ct. 1810, 6 Cranch, 286, WASHINGTON, J.

"Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.

"It is unnecessary to inquire into the effect of this treaty under the confederation, because, before John Baptiste Chirac emigrated to the United States, the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land.

"The repeal of this treaty could not affect the real estate acquired by John Baptiste Chirac, because he was then a naturalized citizen, conformably to the act of Congress; and no longer required the protection given by treaty."

As to the effect of the original Chirac dying after the treaty had expired, the Chief Justice, in his opinion, says:

"If, then, the treaty between the United States and France still continued in force, the defendant would certainly be entitled to recover the land for which this suit is instituted. But the treaty is, by an article which has been added to it, limited to eight years, which have long since expired. How does this circumstance affect the case?

"The treaty was framed with a view to its being perpetual. Consequently, its language is adapted to the state of things

Jackson vs. *Clark*, U. S. Sup. Ct. 1818, 3 Wheaton, 1, MARSHALL, Ch. J.

Morris vs. *United States*, U. S. Sup. Ct. 1899, 174 U. S, 196, SHIRAS, J., as to laws of Maryland as affected by treaty.

Dunlop vs. *Alexander*, U. S. Cir. Ct., D. C. 1808, 1 Cranch C. C. 498.

Carneal vs. *Banks*, U. S. Sup. Ct. 1825, 10 Wheaton, 181, MARSHALL, CH. J.

In this case specific performance of contract was asked and a number of objections to title were raised, amongst them that in the plaintiff's claim of title there was a French citizen who could not, under the alienage laws of Kentucky where the land was situated, inherit and transmit real property. The Chief Justice disposed of that objection on p. 189 as follows:

"The alleged alienage of Lacassaign constitutes no objection. Had the fact been proved, this Court decided, in the case of *Chirac* vs. *Chirac*, (reported in 2 Wheat. Rep. 259), that the treaty of 1778, between the United States and France, secures to the citizens and subjects of either power the privilege of holding lands in the territory of the other; and the omission to record the deed in time, may involve the title in difficulty, but does not annul it. That circumstance might oppose considerable obstacles to a decree for a specific performance, if sought by Carneal's heirs, but does not justify a decree to set aside the contract."

contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. The court must decide on the effect of this added article in the case which has occurred. It will be admitted, that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years, or gave rights during eight years which survived it.

"The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. The instant the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent the day before its expiration, has precisely the same rights under it as he who acquired them the day after its formation. He is seized of the same estate, and has precisely the same power during life to dispose of it. This limitation of the compact between the two nations, would act upon, and change all its stipulations, if it could affect this case. But the court is of opinion, that the treaty had its full effect the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant."

§ 333. **The Pollard Case; Justice Baldwin's opinion; 1840.**—In *Lessee of Pollard's Heirs* vs. *Gaius Kibbé*, decided by the Supreme Court in January, 1840, the question involved was the validity of a grant under the treaty with France of 1802, and the treaty with Spain in 1819.[1]

In a long opinion, Mr. Justice Baldwin says, in regard to the supremacy of treaties, after reviewing the decisions of the Supreme Court in this respect:

"The Constitution of the United States declares a treaty to be the supreme law of the land, of consequence, its obli-

§ 333.

[1] *Pollard's Lessee* vs. *Kibbé*, U. S. Sup. Ct. 1840, 14 Peters, 353, THOMPSON, J. See also *Pollard's Lessee* vs. *Files*, U. S. Supreme Ct. 1844, 2 Howard, 591, CATRON, J.; and *Pollard's Lessee* vs. *Hagan*, U. S. Sup. Ct. 1845, 3 Howard, 212, MCKINLEY, J.

ı on the Courts of the United States must be admitted. ertainly true, that the execution of a contract between ıs, is to be demanded from, and generally superintended › executive of each nation. . . . But where a treaty law of the land, and, as such, affects the rights of ȝ litigant in Court, that treaty as much binds their , and is as much to be regarded by the Court, as an act ıgress; and on this principle it was held, that a stipula- : a treaty that property (shall be) restored, operated as nediate restoration, and annulled a judgment of con- ıtion previously made. The fourth article of the treaty ce with Great Britain, in 1783, stipulated that creditors neet with no lawful impediment to the recovery of The sixth article stipulated, that there (shall be) no confiscations, and that persons in confinement (shall mediately set at liberty, and prosecutions commenced ɔntinued. The ninth article of the treaty of 1794 ted, that British subjects, etc., (shall continue to hold etc. In *Ware* vs. *Hylton*, it was held, that the treaty ce repealed and nullified all state laws, by its own ion, revived the debt, removed all lawful impediments, ıs a supreme law, which overrules all state laws on the , to all intents and purposes; and is of equal force ect as the Constitution itself. In *Hopkirk* vs. *Bell*,[2] aty was held to repeal the Virginia statute of limita- In *Hunter* vs. *Martin*,[3] the treaty of 1794 was held he supreme law of the land; that it completely pro- and confirmed the title of Fairfax, even admitting e treaty of peace had left him wholly unprovided for; a public law, it was a part of every case before the and so completely governed it, that in a case where a was ratified after the rendition of a judgment in the Court, which was impeachable on no other ground ıe effect of a treaty, the judgment was reversed on ɔund.

› treaty of 1778, with France, stipulated that the sub- France shall not be reputed aliens; and it was held,

irk vs. *Bell*, U. S. Sup. Ct. Cranch, 453, and 4 Cranch,

[3] *Hunter* vs. *Martin*, same as *Martin* vs. *Hunter*, U. S. Sup. Ct. 1816, 1 Wheaton, 304, STORY, J.

that it gave them the right to purchase and hold lands in the United States, and in that respect put them on the precise footing as if they had become citizens. . . . All treaties, compacts, and articles of agreement in the nature of treaties to which the United States are parties, have ever been held to be the supreme law of the land, executing themselves by their own fiat, having the same effect as an act of Congress, and of equal force with the Constitution."[4]

§ 334. **Hauenstein vs. Lynham; Justice Swayne's opinion; 1879.**—The decisions of the Supreme Court were again reviewed in the case of *Hauenstein* vs. *Lynham*, which brought before the court in 1879 the construction of our then existing treaty with Switzerland.[1] Mr. Justice Swayne delivered the opinion of the court, and answered the question whether

[4] This extract from opinion in *Pollard* vs. *Kibbé* will be found at pp. 412–415, 14 Peters, U. S. Rep.

§ 334.

[1] Convention of Friendship, Commerce and Extradition between the United States and the Swiss Confederation, concluded November 25, 1850, ratifications exchanged November 8, 1855. U. S. Treaties, edition 1889, p. 1072. See Article V, p. 1074, for reciprocal provisions, as to disposition of real estate and personal property, which is as follows:

"ARTICLE V.

"The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or ab intestato, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

"The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the Canton in which it may be situated, there shall be accorded to the said heir, or other successor,

or not a State law must give way to a treaty which was the direct point at issue in the case, as follows:

"The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this Court said: 'If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution.' . . . There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions or to make them yield to the general government and treaties made by their authority. A treaty cannot be the *supreme law of the land*, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, and act of the State legislature, must not be prostrate before it? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and the laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification of a State legislature, this certain consequence follows,—that the will of a small part of the United States may control or defeat the will of the whole."[2]

A large part of Mr. Justice Swayne's opinion in this respect is quoted from the opinion delivered by Mr. Justice

such term as the laws of State or Canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated."

[2] *Hauenstein* vs. *Lynham*, U. S. Sup. Ct. 1879, 100 U. S. 483, SWAYNE, J., and see pp. 488–489 as to treaty with Switzerland; see also *Jost* vs. *Jost*, Sup. Ct. Dist. Col. 1882, 12 Mackey, 487, Cox, J.

Chase in *Ware* vs. *Hylton*;[3] in regard to the authority of that decision, which had been delivered more than eighty years previously, he says: "It shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country."

In regard to later decisions of the Court, Justice Swayne says: "In *Chirac* vs. *Chirac*,[4] it was held by this Court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to; and seems not to have been a factor of importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* vs. *Banks*,[5] and with respect to the British treaty of 1794, in *Hughes* vs. *Edwards*.[6] A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. By the British treaty of 1794, 'all impediment of alienage was absolutely leveled with the ground, despite the laws of the State. It is the direct constitutional question in its fullest condition. The Supreme Court held that the stipulation was within the constitutional powers of the Union.'

"Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' *If the national government has not the power to do what is done by such treaties, it cannot be done at all*,[7] for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws

[3] See §§ 324 *et seq.* of this chapter, *ante*.

[4] See § 332, pp. 14, *et seq.*, *ante*.

[5] See note under § 332, pp. 14, *et seq.*, *ante*.

[6] *Hughes* vs. *Edwards*, U. S. Sup. Ct. 1824, 9 Wheaton, 489, WASHINGTON, J., and see p. 14, *ante*.

[7] The italics are the author's.

Constitution. This is a fundamental principle in our
em of complex national polity."

335. **Geoffroy vs. Riggs; Justice Field's opinion 1889; great extent of the treaty-making power.**—In 1889 the
ition of the treaty-making power of the United States
again before the court in the case of *Geoffroy* vs. *Riggs*;[1]
Justice Field reviewed the cases already cited and held
the seventh article of the treaty with France of 1800,[2]
ts terms suspended the provisions of the common law of
yland, and also of the statutes of that State of 1780 and
, so far as they prevented citizens of France from taking
erty within the United States, either real or personal, by
ritance from citizens of the United States.

the course of his opinion he says in regard to the extent
ie power: "That the treaty power of the United States

35.

eoffroy vs. *Riggs*, U. S. Sup. 890, 133 U. S. 258, FIELD, J., see further reference to this § 425, *post.*

onvention of Peace, Commerce Navigation between the Pre- Consul of the French Repub- the name of the people of e and the President of the d States of America. Con- d September 30, 1800. Ratifi- is exchanged July 31, 1801. aimed December 21, 1801. U. eaties and Conventions, edi- 889, p. 322. See also p. 324.

"ARTICLE VII.

he citizens and inhabitants of nited States shall be at lib- o dispose by testament, dona- or otherwise, of their goods, ole and immovable, holden territory of the French Re- in Europe, and the citizens French Republic shall have ame liberty with regard to , movable and immovable, a in the territory of the d States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed ab intestato, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded, under any pretext whatever; and the said heirs, whether such by particular title, or ab intestato, shall be exempt from any duty whatever in both countries. It is agreed that this article shall in no manner derogate from the laws which either State may now have in force, or hereafter may enact, to prevent emigration; and also that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be, and the other nation shall be at liberty to enact similar laws.

extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.[3] But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign county."[4]

§ 336. **The Chinese influx; legal questions and treaty rights involved.**—The occasions, however, for rendering the most far-reaching decisions in regard to State laws and Federal treaties arose from the attempts made by the Pacific States to prevent, by means of State legislation, the immigration of the Chinese into those States, or, after their arrival, to so discriminate against them in their lives and occupation that they would either return to China, or leave the States which were unfriendly to them.

Our treaties with China contain reciprocal provisions for the right of immigration, travel and daily pursuit of business and labor of American citizens in China and of Chinese subjects in the United States; it must be admitted, therefore, that until the abrogation of those treaty provisions, or the enactment of Congressional legislation superseding them,[1] Chinamen had as much right to come to the United States and engage in labor and business, as our citizens had, and still have, to go to China and carry on their trade and business in that country.

[3] See §§ 426, 474, *post*, for views of Chancellor Kent in regard to the extent of treaty-making power as to alienation of territory belonging to a State. See also views of Justice WHITE expressed in *Downes* vs. *Bidwell* (*Insular Cases*), 182 U. S. 244; referred to in § 475, *post*.

[4] Extract is at pp. 266–267, 133 U. S. Rep.

§ 336.

[1] This chapter relates only to the

Undoubtedly the influx of the Chinese into California and the other States on the Pacific slope was wholly uncontemplated by the negotiators of the treaty, and the subsequent satisfactory adjustment of all differences in regard to such immigration with the Celestial Empire, shows that the Chinese Government did not desire, nor did it expect, that general permission should be given to empty entire provinces of their most undesirable and lowest class of laborers into this country. All that the Chinese Government desired or asked in regard to immigration was that their merchants, traders and scholars should be allowed the same access to our shores that they afforded to our merchants, travelers, scholars and missionaries; all of these points were very satisfactorily settled by the treaty of 1894, and the United States was relieved from even any imputation of breaking faith with another nation by wilfully violating treaty stipulations.[8]

§ 337. **This chapter devoted to State Legislation and treaty rights.**—The effect of congressional action upon the treaties with China will be considered in a succeeding chapter. We will refer in this chapter only to the attempts made by the States in their individual capacities to check the evil of immigration; the numerous Chinese Treatment Cases in which State statutes were held void demonstrates beyond peradventure the legal proposition which has already been stated, that no matter what grievance any State may have in regard to any international matter, it can obtain relief only through the Central Government, and that it not only has no power to deal with the foreign nation interested, but it has no power to legislate within its own territory in any way which affects a foreign power, or citizens of a foreign power at peace, and having treaty relations, with the United States, so far as such legislation violates in any manner whatever any existing treaty stipulations or provisions.

§ 338. **Anti-Chinese legislation in Pacific Coast States.**—The Chinese immigration into California commenced in

relative effect of treaty stipulations and *State* laws. The relative effect of treaty stipulations and the anti-Chinese *Congressional* legislation is treated separately in § 378, *post*, chap. XII.

[8] Treaty of 1894. See U. S. Treaties in Force, edition, 1899, p. 122. 29 U. S. Stat. at L. 1210.

the latter sixties or early seventies while the Pacific Railroads were being built and there was a great demand for cheap labor.

At first the few ship loads of Chinamen that were landed in the Pacific ports facilitated the more rapid and economical construction of those great iron links between the East and the West; so far from menacing the welfare of the Pacific slope, this Chinese element materially assisted its development; when, however, instead of arriving in occasional hundreds, they began to pour in by thousands every month, the Chinese question assumed far different, and very dangerous, conditions; there can be no doubt that the final action taken by Congress in response to the demand of the Pacific States was wise and prudent and that the exclusion of the lower class of Chinamen was beneficial, not only to the Pacific slope, but to the whole community. Prior, however, to Congressional action, the States took the matter into their own hands and attempted, by local legislation, without the sanction of Congress, to discriminate against Chinamen; in doing this the legislators did not reckon upon the far-reaching strength of the second clause of Article VI of the Constitution, which makes treaties made by the United States the supreme law of the land and binding upon the judges in every State, "anything in the Constitution or laws of any State to the contrary, notwithstanding."

§ 339. **Interference of Federal judiciary to protect treaty rights of aliens.**—As soon, therefore, as these anti-Chinese laws were passed questions were raised in the State and Federal Courts as to their validity; in almost every instance the strong power of the Federal Judiciary had to be exercised in declaring these laws to be null and void; the jurisdiction existed because they were in conflict with treaty provisions, which, under the Constitution, were paramount and protected the subjects of the Chinese Emperor, notwithstanding the effort of the States to deprive them of rights which the United States Government, alone, could control.

No attempt will be made to enumerate all of the anti-Chinese laws passed by the Pacific States; a few instances will be given of the most important cases in which the conflict of State statutes and Federal statutes was raised, and

reference will be made in the notes to other decisions in similar cases.

§ 340. **Oregon statute prohibiting employment of Chinese laborers declared void.**—In order to prevent the employment of Chinese labor to as great an extent as possible, the State of Oregon passed a law prohibiting the employment of Chinese laborers on public works. An attempt was made under this statute to enjoin a contractor from employing Chinese labor. Judge Deady, of the United States District Court, held[1] that "the United States court had jurisdiction under the treaties between the United States and China of 1858 and 1868; that until abrogated or modified these treaties were the supreme law of the land and that the courts were bound to enforce them." In regard to the right to labor while in this country, he declared, that the right to come and reside given by the treaty necessarily implied the right to live and to labor for a living, and that so far as the *State* was concerned, Chinese subjects had a right to enjoy all the privileges here of the most favored nation.

In regard to State interference with treaty rights, the opinion says: "So far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether. But it is not necessary to consider further this feature of the case, because, this demurrer must be sustained upon other grounds.

§ 341. **California's constitution of 1879; anti-Chinese provisions declared void.**—In California the anti-Chinese agitators went further; the constitution adopted in 1879, among other things, prohibited corporations from employing Chinese labor and authorized the enactment of all legislation necessary to enforce the provision; statutes were accordingly passed making such employment a misdemeanor; one Tirburcio Parrott was arrested for violating one of these statutes; he sued out a writ of *habeas corpus* in the United

§ 340.
[1] *Baker vs. City of Portland*, U. S. Cir. Ct. 1879, 5 Sawyer, 566. See p. 570, Fed. Cas. 777, DEADY, J.

States courts, on the ground that the provision of the State constitution and acts passed thereunder were void, because they were in violation of the provisions of the treaty of 1868 with China; in a long and able opinion, Mr. Justice Sawyer reviewed the whole treaty-making power of the United States, holding that the laws violated treaty provisions, and he discharged the petitioner.

In the course of the opinion, after citing Article VI of the Constitution of the United States, he says:

"There can be no mistaking the significance, or effect of these plain, concise, emphatic provisions. The states have surrendered the treaty-making power to the general government, and vested it in the president and senate; and when duly exercised by the president and senate, the treaty resulting is the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated." Citing from *Ware* vs. *Hylton*, he continues: "It is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty, or any other made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct." [1]

§ 342. **California anti-Chinese statutes declared void.**— In the case of *Chy Lung* vs. *Freeman* [1] the United States Supreme Court held that a statute of California ostensibly

§ 341.

[1] *In re Tirburcio Parrott*, U. S. Cir. Ct. Cal. 1880; 6 Sawyer, 349. See p. 369, HOFFMAN, SAWYER, JJ.

§ 342.

[1] *Chy Lung* vs. *Freeman*, U. S. Sup. Ct. 1875, 92 U. S. 275, MILLER, J.

See also *In re Ah Fong*, U. S. Cir. Ct. Cal. 1874, 3 Sawyer, 144, FIELD, J.

In re Ah Chong, U. S. Cir. Ct. Cal. 1880, 6 Sawyer, 451, SAWYER, J. State law prohibiting aliens, who could not be naturalized, from fishing in public waters held void because in contravention of stipulations in Chinese treaty as discriminating against Chinese and in favor of other aliens.

In *United States* vs. *Quong Woo*, U. S. Cir. Ct. Cal. 1882, 13 Fed. Rep. 229, 7 Sawyer, 526, FIELD, J., which was one of the Chinese Laundry Cases an ordinance making it unlawful to establish and carry on laundries within certain limits without having obtained the consent of the Board of Supervisors, which should only be based upon recommendations of not less than twelve citizens and taxpayers in the block in which the laundry was to be established, was *held* void

passed to prevent lewd and debauched women from foreign countries landing in ports of the States, although apparently general in its terms, was, in reality, aimed at *all* Chinese women, and that it was void because it extended far beyond the necessities of State control of commerce and thereby invaded the right of Congress to regulate commerce with foreign nations.

One of the most interesting cases in this respect was the famous *Queue* case which involved the validity of an ordinance of the City of San Francisco providing that every person imprisoned in the county jail upon a criminal judgment should immediately, upon arrival at the jail, have his hair clipped to the uniform length of one inch from the scalp; as can readily be seen, this was not a regulation for care of convicts, but the action of a municipal corporation aimed directly at a particular class, although the ordinance was clothed in language which apparently veiled the actual intent.[2]

§ 343. **Justice Field's opinion in the Chinese Queue Case; 1879.**—The case was argued before Mr. Justice Field, sitting as Circuit Judge at San Francisco, in 1879. He decided that the ordinance was invalid and unconstitutional under the provisions of the Fourteenth Amendment, because it was aimed at, and applied to, a particular class of persons, thereby denying to them equal protection under the laws; he also held, that as the legislation was aimed at a class of aliens it was void because it violated the treaty stipulations with China.

In deciding this point the learned Justice said:

"We are aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither and expel from the state those already here. Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility

and improper as repugnant to the provisions with the treaty with China.

But see § 344 and also cases collated under §§ 356–357, *post*, of this chapter, in which laws and ordinances have been sustained on the ground that the matters involved are within the police power of the State.

[2] *Ho Ah Kow* v. *Nunan*, U. S. Cir. Ct. Cala., 1879, 5 Sawyer, 552, FIELD, J. See next section for extract from opinion.

of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonism of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies. To that government belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The state in these particulars, with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted. The state may exclude from its limits paupers and convicts of other countries, persons incurably diseased, and others likely to become a burden upon its resources. It may perhaps also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government. That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain; whether they shall be restricted in business transactions to such as appertain to foreign commerce, as is practically the case with our people in China, or whether they shall be allowed to engage in all pursuits equally with citizens. For restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded. Be that as it may, nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the state, or its municipal bodies, like the ordinance in question—legislation which is unworthy of a brave and manly people. Against such legislation it will always

be the duty of the judiciary to declare and enforce the paramount law of the nation."[1]

§ 344. **State statutes upheld; Chinese Laundry Cases.**— It must not be presumed, however, that the Federal Courts have always interfered to prevent State action in regard to matters which are wholly under their control, and that they have used the treaty-making power as an excuse for interfering in their internal affairs; in 1885 the same learned Justice of the Supreme Court who had declared the San Francisco queue ordinance invalid, sustained a municipal ordinance of San Francisco imposing certain regulations and restrictions upon laundries, and which was as undoubtedly aimed directly at the Chinese as the queue ordinance had been; the Supreme Court held, however, that the regulation of laundries was a matter which came within the right of the municipality, and that treaty stipulations as to rights to live and labor should not be used to prevent the proper enforcement of municipal regulations.[1]

§ 343.

[1] 5 Sawyer p. 563-564.

§ 344.

[1] *Soon Hing* vs. *Crowley*, 113 U. S. 703, U. S. Sup. Ct. 1885, FIELD, J.

In this case the San Francisco municipal ordinance in regard to laundries was under consideration and the question of whether or not it was aimed expressly at the Chinese was involved.

The points decided are stated in the syllabus as follows:

"The decision in *Barbier* vs. *Connolly*, U. S. Sup. Ct. 1885, FIELD, J., 113 U. S. 27,—that a municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined territorial limits, from ten o'clock at night, to six in the morning, is a police regulation within the competency of a municipality possessed of ordinary powers—affirmed.

"It is no objection to a municipal ordinance prohibiting one kind of business within certain hours, that it permits other and different kinds of business to be done within those hours.

"Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions impair the equal right which all can claim in the enforcement of the laws.

"When the general security and welfare require that a particular kind of work should be done at certain times or hours, and an ordinance is made to that effect, a person engaged in performing that sort of work has no inherent right to pursue his occupation during the prohibited time.

"This court cannot inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the acts, or be inferable from their operation,

§ 345. **Numerous other decisions involving Chinese treaties and statutes.**—There have been numerous decisions arising out of both State and Federal legislation in regard to the immigration of Chinese into this country, and the regulation of their conduct after their arrival; it is impossible to analyze them all in this chapter, but a list of Chinese legislation cases will be found in the notes. It will well repay any one studying in detail questions regarding the extent to which the Federal treaty power can regulate State laws and municipal ordinances to carefully examine all of those opinions, as they are the carefully prepared utterances of some of our ablest jurists.

§ 346. **Great practical advantages of Federal Judiciary as a forum for settling disputes as to treaty rights.**—Regardless of the legal results of those opinions, they bring prominently forward the great value to this country of the Federal Judiciary as the balance wheel that so regulates Federal and

considered with reference to the condition of the country and existing legislation."

The Chinamen complained that this ordinance was expressly aimed at them, but in regard to that the court said at the close of the opinion, pp. 710–711:

"The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

State powers that although it may, at times, be necessary to assert one in order to curb the other, it can be done through the medium of courts presided over by impartial judges who can determine whether there has been an improper exercise of power on one side, or an attempt on the other to overthrow proper legal restraint; in no instance has the advantage of the Federal Judiciary been exhibited to a greater degree than in the settlement and adjustment of the questions arising out of the Chinese immigration and the legislative action of the States most affected thereby, as well as of the Congressional action of the United States, in regard thereto.

§ 347. **Treaties with Indians; Chief Justice Marshall's opinion as to their sanctity; Indian treaties and State laws.**—Treaties with Indians, while they differ in some respects from treaties with foreign nations, have been held by Chief Justice Marshall to be entitled to the same consideration in regard to their construction, and to the same limitations in regard to legislative action as treaties with foreign powers. Decisions affecting treaties with Indians are, therefore, in many respects, of equal weight in regard to these points as those affecting treaties with foreign nations.[1]

The treaty between the United States and the Bannock Indians gave the Indians certain rights to hunt on unoccupied lands which afterwards became a part of the State of Wyoming. Game laws having been enacted in Wyoming, Race Horse, a Bannock Indian, was arrested for violating them.[2] Judge Riner, in the United States Circuit Court held that, as the provisions of the State statute were inconsistent with the treaty, the statute could not be enforced against the Indians, as the treaty under the Constitution was paramount. Here was a direct conflict between the State and Federal officers in regard to a subject-matter entirely under the control of the laws of the State. The cases

And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence."

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[1] See the Cherokee Indian cases referred to at length under §§ 408, *et seq.*, of chap. XIV, *post*.

[2] *In re Race Horse*, U. S. Cir. Ct.

already referred to, as well as others, were referred to in Judge Riner's opinion. The right of the State to pass the laws was maintained, and it was conceded that "the State has the unquestioned right to pass laws placing restrictions and limitations upon the time and manner of taking wild game and fish. . . . The wisdom of such legislation is apparent, . . . but that these powers are subject to the right of the General Government to exercise the powers conferred upon it by the Constitution is perfectly clear."

This case was subsequently reversed by the Supreme Court on the ground that certain provisions in the statute admitting Wyoming as a State had abrogated the treaty so far as they were in conflict therewith because it was a later expression of Congress and superseded all prior statutes and treaties. Reference will be made to that element of the decision in a subsequent chapter, but the point that a State law which violated the rights under treaties with Indians were void *so long as the treaties remained in force* was not affected by the reversal of the decision on the grounds taken by the Supreme Court.[3] Indian treaties will be the subject of an entire chapter and only a casual reference is made at this point to the general effect of State laws and treaties.[4]

§ 348. **Decisions of State courts as to State laws and treaties.**—The decisions referred to so far have been made

Wyoming, 1894, RINER, J., 70 Fed. Rep. 598.

[3] *Ward* vs. *Race Horse*, U. S. Sup. Ct. 1896, WHITE, J., 163 U. S. 504. See p. 514 and see dissenting opinion, BROWN, J.

[4] Some of the cases involving the relative effect of State laws and Indian treaties are here cited; others will be found under appropriate sections of chapter XIV, *post*.

Taylor vs. *Brown*, U. S. Sup. Ct. 1893, 147 U. S. 640, FULLER, CH. J.

Bell's Gap Railroad Co. vs. *Pennsylvania*, 134 U. S. 232, affirmed as to the point that a provision in a State law for the assessment of a State tax upon the face value of bonds, instead of upon their nominal value, violates no provision of the Constitution of the United States.

The New York Indians vs. *United States*, Ct. Claims, 1895, 30 Ct. Claims, 413.

The New York Indians, U. S. Sup. Ct. 1866, 5 Wallace, 761, NELSON, J.

The statute of a State authorizing the sale of lands for taxes laid by a State is void if it in any way conflicts with an Indian treaty, and any sale under such tax is void so far as it affects the rights of the Indians to occupy the lands. Also the right of Indians to sell their lands discussed.

Stevens vs. *Thatcher*, Sup. Ct. Me. 1897, 91 Maine, 70, EMERY, J.

by the courts of the United States; it may be said that the natural trend of those courts is to expand the Federal power so as to prefer treaty stipulations to State statutes; it is not necessary, however, to rely exclusively upon utterances of the Federal Judiciary in this respect; there are numerous instances in which the State courts have recognized the supremacy of treaty stipulations over statutes of their own States.

A few instances in which the highest courts of States have recognized this supremacy will be given and an examination of the cases referred to in the notes will show that the State courts have not only recognized the force of the second clause of Article VI, of the Constitution, but have also recognized the advantages which have accrued to the States as the result of vesting the treaty-making power exclusively in the Central Government, as well as the fact that they have appreciated the necessity of giving the Federal Government the most complete power in order that it can best subserve the interests of the States.

§ 349. **The rule in New York.**—Alexander Hamilton was the first to recognize the sanctity of Federal Treaties, and their supremacy to State laws. Stanch patriot as he was, he maintained even at the threatened loss of his popularity, the rights of certain British land owners in New York City

In an action involving treaty rights of Indians on White Squaw Island in the Penobscot River, Maine, it was claimed that provisions in the treaties debarred the legislature from including any of the Penobscot Islands above Old Town within any incorporated town; it was held that this could not be sustained.

Lowry vs. *Weaver*, U. S. Cir. Ct. Ind. 1846, 4 McLean, 82.

Held, that Indians living in a State and doing business as merchants are responsible by the laws of the State for the payment of their debts, notwithstanding treaty reservations, and that lands reserved to them under a treaty may, under some circumstances be made responsible for the payment of their debts notwithstanding such stipulations.

Seneca Nation vs. *Christie*, N. Y. Ct. App. 1891, 126 N. Y. 122, ANDREWS, J. Affirming same case, 49 Hun, 524, BRADLEY, J. Writ of error to the Supreme Court dismissed, 1896, 162 U. S. 283, FULLER, CH. J.

A full history is given in this action of the relations of the Seneca Indians with New York, Massachusetts and the United States. The principles laid down in *Johnson* vs. *McIntosh* as to title followed, and the relations of the colonies and States with the Indians also discussed.

under the treaty, against persons who claimed possession of houses in that city under State statutes.[1]

Judge Denio in the New York Court of Appeals[2] upheld the treaty-making power of the United States; the action involved the construction of a treaty with Indians, but he stated that the rule was similar to that which applied to all other treaties entered into by the United States, to-wit: that it became "a parcel of the paramount law and must prevail over all State laws." Continuing he showed that the guarantees in the treaty were not limited to actions by the United States Government but extended equally to the acts or statutes of all the States and of citizens of the Union.

"This results," says the opinion, "from the nature of the treaty-making power and from the paramount authority which the Constitution attributes to federal treaties when it declares them to be the supreme law of the land. A treaty concluded by the President and Senate binds the nation in the aggregate and all its subordinate authorities and its citizens as individuals, to the observance of the stipulations contained in it. The principle has been asserted and established by repeated decisions of the Supreme Court of the United States.[3] This (New York) State was, therefore, precluded from passing any laws which should disappoint or frustrate the guarantees afforded to the Seneca Nations by the treaties to which I have referred. Any act of the Legislature, the execution of which would dispossess the Indians of the reservations or any part of them, or which should materially disturb their occupancy, would, therefore, be illegal."

Truscott vs. *Hurlburt, L. & C. Co.*, U. S. Cir. Ct. App. 9th Circuit, 1896, 44 U. S. App. 248, Ross, J.

Love vs. *Pamplin*, U. S. Cir. Ct. Tenn. 1884, 21 Fed. Rep. 755, MATTHEWS, J.

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[1] *Elizabeth Rutgers* vs. *Joshua Waddington*, Mayor's Court of the City of New York, August 7, 1784. For a full account of the passage of the New York Trespass Act and Alexander Hamilton's appearance and argument on behalf of British claimants affected thereby, and his contention that the treaty protected the rights of his clients, see McMaster's History of the People of the United States, vol. I, chap. II, pp. 125, *et seq.*; see also pamphlet of H. B. Dawson on same subject referred to by McMaster.

[2] *Fellows* vs. *Denniston*, N. Y. Ct. of Appeals, 1861, 23 N. Y. Rep. 420, DENIO, J.

[3] Citing *Ware* vs. *Hylton*, 3 Dallas, 199, *Worcester* vs. *State of Georgia*, 6 Peters, 515.

The rule had already been laid down by Judge Van Ness in 1809 that land in New York vested in alien subjects of Great Britain under the provisions of the treaty notwithstanding the anti-alien laws of the State.[3]

In *People* vs. *Warren*,[4] the defendant had been convicted of employing Italians on city work in Buffalo under a statute of the State which made it a crime for any one contracting with a municipal corporation to employ aliens as laborers upon the work done under the contract.

The court held that the act was unconstitutional as to the State and Federal Constitutions and also that it was void because it was repugnant to the treaty between the United States and the King of Italy of 1871, which provides in Article III, in substance, that resident Italians in the United States shall enjoy the same rights and privileges in respect to their persons and property as are secured to our United States citizens.[5] Other decisions of New York courts are cited in the notes to this section.[6]

[3] *Jackson* vs. *Wright*, Sup. Ct. N. Y. 1809, VAN NESS, J., 4 Johnson, 75.

[4] *People* vs. *Warren*, Sup. Ct. Buffalo, N. Y. 1895, 13 Misc. Rep. 615.

[5] These provisions of the treaty are quoted in the notes to § 356, of this chapter, *post*.

[6] *Jackson* vs. *Decker*, N. Y. Sup. Ct. 1814, 11 Johns. N. Y. 418, SPENCER, J.

Jackson vs. *Lunn*, N. Y. Sup. Ct. 1802, KENT, J. (afterwards Chancellor), 3 Johnson's Cases, 109.

Orser vs. *Hoag*, N. Y. Sup. Ct. 1842, NELSON, CH. J., 3 Hill, 79.

Watson vs. *Donnelly*, N. Y. Sup. Ct. 1859, ALLEN, J., 28 Barb. 653. This was a question involving the right of a British subject to devise lands and of the devisees to dispose of the same.

The opinion goes at length into all of the cases in the Supreme Court and of the effect of a statute of the State of New York passed in 1825 as to the rights of aliens.

In closing the opinion the court says, pp. 660–661:

"The Court of Appeals held, that land conveyed to an alien pursuant to the provisions of that act might continue to be held by alien heirs and *alien devisees* of the grantee, until by inheritance, devise or grant the title came to a citizen. The plaintiff, an alien, claimed under a will of an alien, and his title was held valid; and the word 'assigns,' in the act, was the only word under which a devisee could claim. The opinion of Judge Ruggles is entirely applicable to, and decisive of, the question made under this branch of the case, as to the right of Mrs. Lynch to take as devisee and in turn to devise to her daughter. This being the effect of the treaty of 1794, and the right of alien owners to devise to aliens being guaranteed by

§ 350. **The rule in Illinois.**—In 1897 the Supreme Court of Illinois held[1] that the State act disqualifying aliens must give way if it conflicts with any existing treaty between the United States and Sweden and that the disqualifications imposed by the State act were removed by Article VI of the treaty of 1783,[2] which, although it had terminated by its own limitation, had been revived by Article XVII of the

it, the act of 1825 could not divest them of that right, or deprive the alien devisee of the right to take and hold the estate. The treaty is the paramount law of the land; and even if it were abrogated by the original contracting parties, the vested rights of citizens, under it, would remain. (Const. of U. S. art. 6, s. 2. *Lessees of Gordon* vs. *Kerr*, 1 Wash. C. C. R. 322; *Ware* vs. *Hylton*, 3 Dall. 236; *Dem* vs. *Fisher*, 1 Paine's C. C. R. 54. 8 Wheat. 494.) It is not necessary then to consider the effect of the act of 1825 upon the devise of Dominick Lynch, or determine whether it destroys the common-law rule by which an alien purchaser or devisee could hold the estate purchased or devised, as against all but the government; by which he could take the estate, although not for his own use but the use of the state. (*Jackson* vs. *Beach*, 1 John. Cas. 389. *Jackson* vs. *Lunn*, 3 id. 109. *People* vs. *Conklin*, 2 Hill, 67.) The motion for a new trial must be denied."

Bollermann vs. *Blake*, N. Y. Ct. App. 1883, 94 N. Y. 624, EARL, J.

This case is not reported in full, but it appears that the rights of aliens under the treaty of 1845 with the Grand Duchy of Hesse provided for the reciprocal rights as to inheritance of citizens of one party within the territory of the other party, were sustained.

Kull vs. *Kull*, N. Y. Sup. Ct. Gen. Term, 1885, 37 Hun, 476, DAVIS, J.

Buffalo R. & P. Co. vs. *Lavery*, N. Y. Sup. Ct. 5 Dept. 1894, 75 Hun, 396, BRADLEY, J.

See also cases in New York Surrogate Courts as to right of consul to administer on estates of decedents under treaty stipulations referred to under § 448 of chapter XV; see pp. 333 and 348, *post*.

§ 350.

[1] *Adams* vs. *Akerlund*, Sup. Ct. Ill. 1897, MAGRUDER, J., 168 Ill. Rep. 632.

[2] Treaty of Amity and Commerce, concluded April 3, 1783. U. S. Treaties and Conventions, edition 1889, p. 1042; Article VI (pp. 1043–4) is as follows:

"The subjects of the contracting parties in the respective States may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favour of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called 'droit de détraction' on the part of the Gov-

treaty of 1827.[3] Since that time there have been other decisions to the effect that treaty stipulations are superior to State statutes affecting descent and disposal of property.[4]

ernment of the two States, respectively. But it is at the same time agreed that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States, on their part, or any of them, shall be at liberty to make, respecting this matter, such laws as they think proper.

[3] Treaty of Commerce and Navigation, concluded July 4, 1827. U. S. Treaties and Conventions, edition 1889, p. 1058; Article XVII (p. 1064) is as follows:

"The second, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twenty-first, twenty-second, twenty-third, and twenty-fifth articles of the treaty of amity and commerce concluded at Paris on the third of April, one thousand seven hundred eighty-three, by the Plenipotentiaries of the United States of America, and of His Majesty the King of Sweden, together with the first, second, fourth, and fifth separate articles, signed on the same day by the same Plenipotentiaries, are revived, and made applicable to all the countries under the dominion of the present high contracting parties, and shall have the same force and value as if they were inserted in the context of the present treaty; it being understood that the stipulations contained in the articles above cited shall always be considered as in no manner affecting the conventions concluded by either party with other nations, during the interval between the expiration of the said treaty of one thousand seven hundred eighty-three and the revival of said articles by the treaty of commerce and navigation conclued at Stockholm by the present high contracting parties, on the fourth of September, one thousand eight hundred and sixteen."

[4] *Schultze* vs. *Schultze*, Sup. Ct. Ill. 1893, 144 Ill. Rep. 290, MAGRUDER, J. The point decided in this case is stated in the syllabus (§ 6, p. 291) as follows:

"The effect of the treaty of the United States with Bremen is to suspend, during the period of three years, the operation of the alien law of this State, which makes nonresident aliens incapable of taking lands by descent; and the right of the resident heir or of the heirs capable of taking under the State law, and the right of the State or county to take the land by escheat in default of heirs capable of holding the same, are also suspended during the term of three years named in the treaty."

The treaty provision referred to is Article VII of the Convention of Friendship, Commerce, and Navigation with the Free Hanseatic Republics of Lübeck, Bremen and Hamburg, concluded December 20, 1827, U. S. Treaties and Conventions, edition 1889, p. 533.

Article VII (p. 535) is as follows:

"The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other,

§ 351. The rule in Iowa and Nebraska.—There are at least four cases[1] in which the Supreme Court of Iowa held

by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the Government of the respective States."

Scharpf vs. *Schmidt*, Sup. Ct. Ill. 1898, 172 Ill. Rep. 255, CARTER, J.

Article II of the Convention with Wurttenberg for abolition of *Droit d'Aubaine* and taxes on immigration concluded April 10, 1884. (U. S. Treaties and Conventions, edition, 1889, p. 1144) was held to suspend the Illinois Alien Act of 1887, (Laws of Illinois, 1887, p. 5). Article II is as follows:

"Where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction."

In *Wunderle* vs. *Wunderle*, Sup. Ct. Ill. 1893, 144 Ill. Rep. 40, MCGRUDER, J., it was held (p. 54) that "if a citizen or subject of a foreign government is disqualified under the laws of the State from taking, holding or transferring real property, such disqualification will be removed, if the treaty between the United States and such foreign government confers the right to take, hold or transfer real property," and after citing a number of authorities, the opinion continues: "But the treaty, which will suspend or override the statute of the State, must be a treaty between the United States and the government of the particular country, of which the alien, claiming to be relieved of the disability imposed by the State law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of."

§ 351.

[1] IOWA CASES.

Opel vs. *Shoup*, 100 Iowa, 420, Sup. Ct. Iowa, 1896, GIVEN, J.

In this case the question involved was the right of an alien to inherit property in the State of Iowa which he could not have inherited except under the provisions of the treaty with Bavaria of 1845.

that non-resident aliens could inherit in Iowa where treaties of the United States removed disabilities of the citizens of

That part of the opinion which relates to the treaty rights involved is as follows, at pp. 420 to 425:

"This treaty abolishes, as between these governments and the subjects thereof, 'every kind of *droit d' aubaine*, *droit de retraite*, and *droit de detraction* or tax on emigration.'

"Black's Law Dictionary defines '*droit*' as equivalent to the English word 'right;' and '*droit d'aubaine*' as, 'in French law, a rule by which all the property of a deceased foreigner, whether movable, or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the deceased.' It is this provision of the treaty that we are called upon to consider. Appellants insist that the provisions of the treaty are not applicable to this case; that confiscation was never applied by any government to property of its own deceased citizens; and that the treaty only contemplates the protection of the citizens of either government, who may die having property in the other. The fault of this argument is in assuming that the protection is for the dead, and that the property remains in the deceased. It is conceded that this property vested in some living person immediately upon the death of Mrs. Hormel. If, under the common law, that person was disqualified by alienage from inheriting it, then this treaty applies and removes that disqualification.

"In the absence of this treaty, Mrs. Opel was disqualified, by alienage, from inheriting this property; but by it the disqualification was removed, and therefore the property descended to her. Our inquiry, then, is as to property in Iowa belonging to a resident and subject of Bavaria.

"Appellants cite *Frederickson* vs. *Louisiana*, 23 Howard, 445. 'Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans; also, that the legatees resided in the kingdom of Wurtemberg, and are subjects of the King of Wurtemberg.' We had a treaty with that kingdom similar to that under consideration. Louisiana had a statute providing that 'each and every person, not being domiciled in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State, or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession.' Rev. St. 1876, section 3683. The claim of the state to this tax was resisted, on the ground that it was contrary to the third article of the treaty, and that article alone, and not the second, as in this case, was under consideration. The third article of that treaty relates solely to personal property, and is different in its language from the second, which is identical with the second in this. The court held that the act does not make any discrimination between citizens of

nations in treaty relations with this Government; in each case, however, the statute and treaty must be carefully ex-

the state and aliens in the same circumstance and sustained the tax as valid. Appellants quote from the opinion as follows: 'But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate testamentary disposition of citizens or subjects of the contracting powers with reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other by reason of their alienage, and it is, perhaps, to enable such citizens to dispose of their property, paying such duty only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in contemplation of the contracting powers, and is not embraced in this article of the treaty.' This view of that treaty is applicable to the one before us, but we fail to see wherein it supports the claim that the facts of this case do not bring it within the provisions of this treaty.

"IV. Appellants cite authorities to the effect that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their borders, and from this it is argued that the federal government has no power, 'by treaty,' to interfere with the right of the state in regard to the descent of property upon the death of its citizens;' that treaties made without authority are not valid; that this treaty is in conflict with the laws of Iowa, and is, therefore, of no force or effect. It may be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt to regulate descents of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments, this disqualification is removed. In Article 6 of the Constitution of the United States, it is provided that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution, or the laws of any state, to the contrary notwithstanding.' Many cases may be found wherein the courts have enforced treaty stipulations, similar to this, in favor of foreign claimants; but the case of *People* vs. *Gerke*, 5 Cal. 381, is the first we find wherein the power of the federal government in this respect was questioned. In that case, Deck, a citizen of Prussia, died in

amined, as in several instances the treaty stipulations do not provide for actual inheritance, but only give certain rights

San Francisco, leaving undisposed of a large amount of real property in that state. Article 14 of our treaty with Prussia is the same as Article 3 of this treaty. The attorney general, on behalf of the state, denied the power of the federal government to make such a provision by treaty, and argued, as is done in this case, that to exercise such power would permit the federal government to control the internal policy of the states, and in cases like this to alter materially the statutes of descent. The court, after an able consideration of the subject, concludes as follows: 'I can see no danger which can result from yielding to the federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects the policy of a state government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the state sovereignty known as the 'General Government;' and, when effected, the state policy must give way to that adopted by the governmental agent of her foreign relations.' The reasoning and conclusion of the opinion are strongly emphasized by what is added by Justice Ryan. While the question of the power of the federal government in this respect was not directly passed upon in the following cases, they show that the courts have uniformly enforced such treaties, without doubting the power of the federal government to make them: *Chirac* vs. *Chirac*, 2 Wheaton, 259; *Hauenstein* vs. *Lynham*, 100 U. S. 483; *Geofroy* vs. *Riggs*, 133 U. S. 258 (10 Sup. Ct. Rep. 295); *Fairfax* vs. *Hunter*, 7 Cranch, 603; *Carneal* vs. *Banks*, 10 Wheaton, 189; *Hughes* vs. *Edwards*, 9 Wheaton, 489. In the recent case of *Wunderle* vs. *Wunderle*, 144 Ill. 40 (33 N. E. Rep. 195), the subject of descents and alienage is considered at length and with marked care and ability, as affected by the common law, and by statutes of the states and by treaties with the United States. In considering the effect of conflict between the statute of the state and a treaty with the United States, the court, after citing article 6 of the federal constitution, says: 'In construing this article, it has been held that provisions in regard to the transfer, devise, or inheritance of property are fitting subjects of negotiation and regulation, by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property.' If it may be said that chapter 85 of the Acts of the Twenty-second General Assembly is in conflict with said treaty of January 21, 1845, reason and the authorities support the conclusion that the treaty must control.

of conversion into money, or of tenure for a limited period; the statute in such cases is only superseded to the extent

"It follows from the conclusions we have reached that an undivided one-half of the property in question vested in Mrs. Opel upon the death of her daughter, and upon her death it passed to her children, subject to the conditions imposed by said treaty, and that the other undivided one-half passed to the heirs of John C. Hormel, deceased. The decree of the district court being in harmony with these conclusions, it is affirmed."

Doeherel vs. *Hillmer*, Sup. Ct. Iowa, 1897, 102 Iowa, 169, LADD, J. The treaty with Prussia of 1828 provides that on the death of any person holding real estate within the territory of the one party, where such real estate would, by the law of the land descend on a citizen or subject of the other were he not disqualified by alienage, such citizen shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the governments of the respective States.

The court held, relying upon *Opel* vs. *Shoup*, 100 Iowa, 407; *Wilcke* vs. *Wilcke*, 102 Iowa, 173; *Schultze* vs. *Schultze*, 33 N. E. Rep. 201; *Hauenstein* vs. *Lynham*, 100 U. S. 463, that the provisions in this treaty controled, and that the claimants who were residents of Hanover, Germany, claiming the property as heirs of their mother, who had inherited under a will of an Iowa citizen, took an absolute fee although by an act of the Legislature of Iowa a non-resident alien could only acquire and hold real property of limited value providing that within five years from the date of purchase the property is placed in the actual possession of a relative and that such occupant become a citizen within ten years. The opinion says: "Clearly under the terms of the treaty with the king of Prussia, alienage does not affect the right of inheritance, when the heir or devisee is a citizen or subject of the country of the decedent, and this is not limited to one step in transmission."

Meier vs. *Lee*, 106 Iowa Rep. 303, Sup. Ct. Iowa, 1898, GIVEN, J.

In this case certain persons claimed real estate in Iowa. They were not entitled to inherit under the laws of Iowa, but they invoked the provisions of the treaty with Sweden of 1783, but the court held that they did not apply.

That part of the opinion relating to the treaty point is as follows:

"II. Appellants cite the treaty of 1783, between the king of Sweden and the United States (page 1042, Treaties and Conventions between the United States and Other Powers), and insist that, under article 6 thereof, appellants' mother was not disqualified from inheriting an interest in this land. Article 6 contains the following: 'The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization.' Conceding that this treaty is still in force,—a

that the disabilities are removed, although it has been held that limited fees allowed by State laws, under certain conditions, pass into absolute fees in favor of foreigners with whose government treaty stipulations exist.

A recent case in Nebraska, a Federal court decision however, establishes a similar rule for that State as to the supremacy of treaties made by the Federal Government over State statutes relating to aliens and real estate.[2]

§ 352. **The rule in Tennessee.**—The Supreme Court of Tennessee decided in 1826 in favor of the supremacy of treaties of the United States over all State laws; Judge Catron, who afterwards became one of the Justices of the Supreme Court was one of the justices deciding the case.[1] His colleague discussed the treaty-making power, and the effect of treaties upon State statutes, in the following words, which show that he fully appreciated the necessity for Federal action in regard to all our foreign relations: "Shall it be allowed the State Legislatures, by their acts, to oppose and prevent the executing of a treaty in which the whole Union is interested? . . . Must the whole Union, because of the misconduct of one state be forced into a war? The treaty also should be a law, operating immediately and directly upon the people. If the State Legislatures must be applied to, to pass laws for the execution of treaties, which are in any respect burthen-

matter we do not determine,—we are of the opinion that it does not apply to lands. 'Goods: A valuable possession or piece of property; especially, and almost universally, in the plural, goods, wares, commodities, chattels.' 'Effects: Goods, movables, personal estate.' Webster. 'Goods and effects' have never been held to include real estate. The demurrer was properly sustained, and the decree is therefore affirmed."

[2] *Bahuaud* vs. *Bize*, U. S. Cir. Ct. Nebraska, 1901, 105 Fed. Rep. 485. MUNGER, J.; *held*, that as *resident aliens* are permitted to hold real estate in Nebraska that, under the provisions of the treaty of 1853 between the United States and France, *non-resident aliens*, citizens of France, can acquire and hold land, and that the state statute prohibiting non-resident aliens from acquiring real estate by inheritance or otherwise is inoperative so far as French citizens or subjects are concerned. The decision rests largely upon *Boyd* vs. *Nebraska*, 143 U. S. 135, and *Geofroy* vs. *Riggs*, 133 U. S. 258. The Act of the Legislature of Nebraska was passed March 16, 1889 (Laws, 1889, p. 483).

§ 352.

[1] *Cornet* vs. *Winton*, Sup. Ct. Tenn. 1826, 2 Yerger (Tenn.) 143, (see p. 165) CATRON and HAYWOOD, JJ.

some, they will never do it. Congress applied to the State Legislatures to pass laws for the execution of the Fourth Article of the Treaty of Peace, from 1783 to 1787, and no law was ever made for the purpose. The British nation complained, and was nearly driven into a war, because of the inexecution of the treaty; and finally, the United States would have been involved in war, had it not been for the timely formation of the Federal Constitution, and the declaration contained therein, that treaties should be the supreme law, above all laws and obstructions which could stand in the way. In the United States, the unsullied honor of the nation, and the complete performance of all that it stipulates, is one of the great objects which the constitution proposes to effect."

§ 353. **The rule in Kentucky and Michigan.**—In Kentucky, it was decided in 1862, that the law of the State would have to give way as soon as a treaty took effect.[1] In Michigan the Supreme Court of the State held that "when a treaty has been made by the proper Federal authorities, and ratified, it becomes the law of the land, and the courts have no power to question or in any manner look into the powers or rights of the nation or tribe with whom it is made. The action of the treaty-making power is conclusive upon such inquiry. And when territorial rights are, by treaty, recognized as having existed in one tribe, we are bound to regard it."[2]

§ 354. **The rule in Pennsylvania.**—The rule was adopted in Pennsylvania as early as 1788, which was prior to the Constitution going into effect.[1] It was held that as pro-

§ 353.

[1] *Yeaker's Heirs* vs. *Yeaker's Heirs*, Ct. of Appeals, Ky., 1862, 4 Metcalfe (Ky.), 33, STITES, Ch. J.

[2] *Maiden* vs. *Ingersoll*, Sup. Ct. Mich. 1859, 6 Mich. 373, CAMPBELL, J.

§ 354.

[1] *Respublica* vs. *Gordon*, Sup. Ct. Penna., 1778, 1 Dallas, 252, MCKEAN, Ch. J.

The defendant was included in an act of proclamation issued during the war, and not appearing, was attainted with treason, and his estates confiscated; after peace was declared he returned to Pennsylvania; his estates had never been taken possession of under the confiscation; he was arrested and gave bail; on the return the CHIEF JUSTICE decided that any proceedings against him "would contravene the express articles in the treaty of peace and amity, entered into between the United States of Amer-

ceedings in regard to a bill of attainder against a defendant contravened an express article in the Treaty of Peace between the United States and Great Britain, a suggestion filed by the Attorney-General could not be entertained. In 1806 the point was raised in the Circuit Court of the United States for Pennsylvania and the paramountcy of the treaty of Great Britain over a provision in the Constitution of Pennsylvania sustained.[2]

§ 355. **The rule in Massachusetts.**—There were several early cases in Massachusetts in which the rights of British subjects were sustained under the provisions of the treaty with Great Britain notwithstanding State laws which would in the absence of such provisions have defeated the claims.[1]

ica and Great Britain, for which reason they could not sustain the suggestion filed by the Attorney General, and the defendant was accordingly discharged.

[2] *Gordon* vs. *Kerr*, U. S. Cir. Ct. Pa. 1806; 1 Wash. C. C. 322; Fed. Cas. 5611, WASHINGTON, J.

In this case *held* in regard to the effect of the Great Britain treaty of 1783 on the Constitution of the State of Pennsylvania, that "the Constitution of the State must yield to the treaty of peace which is supreme." On p. 325, the court says:

"This opinion, in the present cause, has been combated by an argument not thought of, or used in the former, which is, that if there was in fact no misnomer, the attainder was complete, and the sale of Gordon's estate under it so entirely valid, that the Legislature could not, in 1783, defeat it directly, or by the declaration of an opinion, which was solely of a judicial nature. This objection, I suppose, is founded upon the Constitution of the State, though it was not read, nor referred to. But be this as it may, even that Constitution must yield to the treaty of peace, which is supreme. The fifth article stipulates, that Congress should earnestly recommend to the States, a revision of their confiscation laws, so as to render them consistent with justice and equity, etc., and should also recommend to them the restitution of confiscated estates. This was not considered as an idle provision, but was intended to be effectual; provided the different States, or any of them, felt disposed to comply with the recommendation. If the States thought proper to restore, their power to do it grew out of this treaty; and so far neutralized any article of their Constitution, which prohibited, in other cases, the exercise of such a right. The State would no doubt feel itself compelled to make compensation to the purchasers, but their power to restore could not, I think, be questioned. If they could restore absolutely, they could do any other act short of that, and tending to better the situation of those whose estates had been confiscated."

§ 355.

[1] *Commonwealth* vs. *Sheafe*, Sup. Ct. Mass. 1810, 6 Mass. 441.

§ 356. **State laws sustained, as not conflicting with treaty stipulations, by State and Federal courts.**—While these cases show that State courts and Judges have felt the binding authority of the United States treaties and have acted in accordance with the mandatory provisions of Article VI of the Constitution in that respect, there are still numerous cases in which both State and Federal courts have refused to construe a treaty so that it renders State legislation inoperative.

The New York Court of Appeals held that a statute preventing intrusions on Indian lands within the State did not interfere with the obligations of the treaty of 1842 with the Seneca Indians, but that it was within the police power of the State, and that the State could not be barred from the proper exercise of police powers to maintain and to preserve the peace. The Supreme Court of the United States sustained the Court of Appeals in this case.[1]

In a suit brought to entitle the commonwealth to certain lands on the ground that the purchaser was an alien and unlawfully held them under the laws of the State, the defendant claiming the property pleaded the British treaty of 1794, and the court expressed itself in that regard as follows:

"By the ninth article of the treaty of 1794, it was agreed that *British* subjects, who then held lands within the *United States*, and *American* citizens, who then held lands within the *British* dominions, should continue to hold them, according to the nature and tenure of their respective estates and titles therein; and might grant, sell or devise, the same to whom they pleased, in like manner as if they were natives. It is stated that O'Neil was a *British* subject, and held the premises in fee within the meaning of that article, when the treaty was made and ratified; and that afterwards he granted and sold the same to the defendant in fee, to secure the payment of a sum of money; and that the defendant lawfully entered for condition broken. Under the article cited, his title cannot now be questioned by the commonwealth."

Hutchinson vs. *Brock*, Sup. Ct. Mass. 1814, 11 Mass. 119, SEWALL, Ch. J.

§ 356.

[1] *Cutler* vs. *Dibble*, U. S. Sup. Ct. 1858, 21 Howard, 366, GRIER, J., (affirming same case N. Y. Court of Appeals, 1857, 16 N. Y. Rep. 203, BROWN, J.).

The question involved in this action was whether a statute passed by the New York Legislature in 1821 respecting intrusions on Indian lands was in violation of the constitution or the treaties between the United States and the Seneca Indians. In sustaining the state act the opinion says (page 370):

"The only question which this court can be called on to decide is,

It was also held that the State Dispensary Statute of South Carolina did not interfere with the rights of Italian citizens to freely carry on business in this country, under the stipulations in the treaty of 1871 with Italy.[2] There are other cases

whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress, and whether this proceeding under it has deprived the relators of property or rights secured to them by any treaty or act of Congress.

"The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relations which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. . . . We are of the opinion, therefore, that this statute and the proceeding in this case are not in conflict with the treaty in question, or with any act of Congress, or with the Constitution of the United States."

[2] *Cantini* vs. *Tillman*, U. S. Cir. Ct. So. Car. 1893, 54 Fed. Rep. 969, SIMONTON, J.

The opinion says, on page 976:

"It is urged on behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

"'Art. 2. The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice; and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

"'Art. 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.'

"Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the Fourteenth Amendment; that it is within the police power. The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such ex-

in which State laws have been upheld, including statutes establishing quarantine and health regulations,[8] succession

ercise cannot be affected by any treaty stipulations. '*Salus Populi Supema Lex.*'" But see *contra:*

People vs. *Compagnie Generale Transatlantique*, U. S. Sup. Ct. 1882, 107 U. S. 59, MILLER, J.

This was one of the passenger cases in which a law of the State of New York imposed a tax on alien passengers coming into the New York port. Reviewing the passenger cases previously decided, the court held the act unconstitutional for the reasons stated in the syllabus, as follows:

"1. The statute of New York of May 31, 1881, imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and void. *Henderson* vs. *Mayor of New York*, 92 U. S. 259, and *Chy Lung* vs. *Freeman*, id. 275, cited, and the rulings therein made reaffirmed.

"2. The statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves and subject to become a public charge, as such facts are not to be ascertained by inspection alone.

"3. The words, '*inspection laws*,' '*imports*,' and '*exports*,' as used in cl. 2, sec. 10, art. 1, of the Constitution, have exclusive reference to property.

"4. This is apparent from the language of cl. 1, sec. 9, of the same article, where, in regard to the admission of persons of the African race, the word 'migration' is applied to free persons, and 'importation' to slaves."

[8] *Compagnie Francaise, etc.* vs. *State Board of Health*, Sup. Ct. Louisiana, 1899, 51 La. Ann. 645, NICHOLS, Ch. J.

In this case the plaintiff attacked the constitutionality and validity of an act of the State of Louisiana establishing a state board of health and authorizing regulations as to immigration. The question involving treaties as expressed in the opinion, p. 597, is as follows:

"Appellants maintain that the act of the general assembly is violative of the constitution of the United States and in contravention of its treaties with France and Italy and its immigration laws. We are not of that opinion. It is the right and duty of the different states to protect and preserve the public health. This right is not held by the states by permission of the federal government nor is its legitimate and proper exercise controlled by that government simply by reason of the existence of a power in the latter 'to regulate commerce.' As a matter of course state legislation which would cross the boundary line which separates the state's police power of protecting the public health to really interfere with and invade the right and power of the general government to regulate commerce, would be set aside; but it is not every restriction upon commercial operations, remotely and incidentally brought about by the passage

taxes,[4] punishment of crimes,[5] and proving title to grants in States carved out of ceded territory.[6]

of state health laws, which can properly be designated as such interference or invasion." (Citing *In re Rahrer*, 140 U. S. 554).

Minn. & S. P. R. R. Co. vs. *Milner*, U. S. Cir. Ct. 1893, W. D. Mich. 57 Fed. Rep. 276, PER CURIAM.

Phila. Southern S. S. Co. vs. *Pennsylvania*, U. S. Sup. Ct. 1887, 122 U. S. 326, BRADLEY, J.

Morgan S. S. Co. vs. *Louisiana Bd. of Health*, U. S. Sup. Ct. 1886, 118 U. S. 455, MILLER, J.

New York vs. *Miln*, U. S. Sup. Ct. 1837, 11 Pet. 102. Right of State to compel returns of alien passengers sustained. *Smith* vs. *Turner*, *Norris* vs. *City of Boston*, 7 How. 283. Right of State to tax alien passengers held unconstitutional. Questions of treaty rights not involved.

In re Wong Yung Quy, U. S. Cir. Ct. Cal. 1880, 6 Sawyer, 237; 2 Fed. Rep. 624, SAWYER, J. (*The Chinese Dead Body Case.*)

United States vs. *Quong Woo*, U. S. Cir. Ct. Cal. 1882, 13 Fed. Rep. 229, and extract therefrom under § 342, p. 28, *ante*.

But see also

Yick Wo vs. *Hopkins*, U. S. Sup. Ct. 1886, 118 U. S. 356, MATTHEWS, J.

Chinese Laundry Case. A municipal ordinance of San Francisco, so framed that it discriminated against Chinese laundries, was held under the Fourteenth Amendment to be unconstitutional and void, and persons arrested thereunder were discharged.

[4] *Prevost* vs. *Greneaux*, U. S. Sup. Ct. 1856, 19 Howard 1, TANEY, Ch. J.

In this case the plaintiff disputed the right of the State of Louisiana to impose a tax of ten per cent on the value of property inherited in that state by a person not domiciliated there and not being a citizen of any state or territory of the United States, on the ground that it was in violation of and inconsistent with the treaty with France of 1853, the seventh article of which provides for a reciprocal right of inheritance of the citizens of one country in the territory of the other on the same terms as the citizens of that country itself.

The state courts had upheld the tax. In affirming this decision, the Chief Justice of the Supreme Court says (at p. 7):

"The plaintiff in error, in his petition to be recognized as heir, claimed title to all the separate property of Francois M. Prevost and his widow, then in the hands of the curator, and of all his portion of the community property, and of all the fruits and revenues of his succession from the day of the death of his brother. And, in adjudicating upon this claim, the court recognized the rights of the appellant, as set forth in his petition, and decided that he became entitled to the property, as heir, immediately upon the death of Fr. M. Prevost.

"Now, if the property vested in him at that time, it could vest only in the manner, upon the conditions

[5] For note 5, see p. 55.

[6] For note 6, see p. 56.

§ 357. Police and taxing powers of the State sustained; The Slaughter House Cases; Justice Miller's opinion. —There is also a line of cases which will be found in the

authorized by the laws of the State. And, by the laws of the State, as they then stood, it vested in him, subject to a tax of ten per cent, payable to the State. And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such an intention. But the words of the article, which we have already set forth, clearly apply to cases happening afterwards—not to cases where the party appeared, after the treaty, to assert his rights, but to cases where the right afterwards accrued. And so it was decided by the Supreme Court of the State, and, we think, rightly. The constitutionality of the law is not disputed, that point having been settled in this court in the case of *Mager* vs. *Grima*, 8 How. 490.

"In affirming this judgment, it is proper to say that the obligation of the treaty and its operation in the State, after it was made, depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State. And its operation is expressly limited 'to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force.' And, as there is no act of the legislature of Louisiana repealing this law and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect."

Frederickson vs. *State of Louisiana*, U. S. Sup. Ct. 1859, 23 Howard, 445, CAMPBELL, J.

In this case a citizen of Louisiana died leaving legacies to certain inhabitants of Wurtemburg. The State of Louisiana claimed a ten per cent tax under a statute which provided that such tax should be paid by every person, not domiciliated in the State and not being a citizen of any other State or Territory of the Union, receiving such legacies.

The legatees claimed that under the treaty of 1844 with Wurtemburg they could not be subjected to such a tax.

It was held in *State* vs. *Poydras*, 9 La. Ann. 165, that any citizen of Louisiana domiciliated abroad is also subject to this tax.

The Supreme Court in *Mager* vs. *Grima*, 8 Howard, 490, sustained the constitutionality of the ten per cent tax law; in this case it held that the treaty did not apply to cases in which a citizen of this country died, leaving his property to legatees within the jurisdiction of the other country and therefore affirmed the judgment in favor of the tax.

The opinion on this point says:

"But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the

notes affecting the Louisiana Succession Tax in which the tax was held constitutional, and not in conflict with treaty

contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting Powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana. It has been suggested in the argument of this case, that the Government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States.

"The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration."

Rabasse's Succession, Sup. Ct. La. 1895, 47 La. Ann. 1452, MILLER, J.

The facts and the points decided in this case are fully stated in the opinion which in its entirety is as follows:

"The deceased, a resident of New Orleans, left heirs residing in France. Our treaty with that country provides in case of death of any citizen of France in the United States, without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs. The stipulation is reciprocal, applying to estates of Americans dying in France. The French consul here appointed a delegate to represent the French heirs, and he applied for recognition to the Civil District Court, in which the succession was being administered. That court denied the application and appointed an attorney for the absent heirs. From the judgment dismissing the intervention of the appellant, claiming recognition as delegate, he prosecutes this appeal.

"There is a motion to dismiss the appeal on the ground that there is no pecuniary interest involved. There is involved a question of the construction and the execution of our treaty with France in respect to the interest of French heirs in a succession of over one hundred thousand dollars. The motion is denied.

"If the treaty is susceptible of the construction of the appellant the result would be to avoid the appointment of the attorney for the absent heirs, and require the recognition of the appellant as the delegate of the French consul. In our view the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent

stipulations with foreign countries, it being shown that citizens of Louisiana were subject to the same tax; in this in-

them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented. Civil Code, art. 1210; *Robouam's Heirs* vs. *Robouam's Executor*, 12 La. 73; *Addison* vs. *New Orleans Savings Bank*, 15 La. 527.

"It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the rights of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, State and Federal. Constitution United States, art. 6, par. 2; 1 Kent's Commentaries, 165; *Ware* vs. *Hylton*, 3 Dallas, 197; 19 How. 1; 100 U. S. 483, 488; 133 U. S. 264, 266; Treaty with France, 1853, 10 Stats., 999, sec. 12; Treaty with Belgium, 1880, Art. XV.

"The treaty discloses no purpose to require our courts to appoint as the attorney for absent heirs the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court as representing the absent heirs, and precluding the appointment of any attorney to represent them.

"It is therefore ordered, adjudged and decreed that the judgment of the lower court, dismissing the intervention of the delegates of the French consul, be avoided and reversed, and it is now ordered, adjudged and decreed that said delegate be recognized and as such delegate, authorized to represent the absent heirs in this succession, and that the succession pay the costs.

"*On application for rehearing.*

"Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power. This view of the treaty to which our decision is confined, displaces the power of the lower court (exerted in ordinary cases) to appoint any attorney to represent the French heirs of this succession.

"The hearing is refused."

Rixner's Succession, Sup. Ct. La. 1896, 48 La. Ann. 552, WATKINS, J.

This is a long opinion in regard to the rights of Italians under the treaty of 1871 as to the succession taxes in Louisiana.

The syllabus is as follows:

"A citizen and subject of Italy is exempt from the payment of the ten per centum tax levied against foreign heirs, on property situated in this State, under Act 130 of 1894, the title to which is derived by testamentary disposition of his mother's will, she having likewise been a citizen of Italy at the date of her death.

"The 'most favored nation clause' of the treaty between Italy and the United States entitles citizens and subjects of the former to the same tax exemptions as the citizens and subjects of the latter are; and the same right to acquire and dispose of personal and real

stance the statutes were originally upheld by the State courts, and the decisions were subsequently affirmed by the Supreme

property within the territory of the latter, by donation, testament or otherwise, from or to aliens and subjects of the former.

"It is both wise and conservative for courts to adhere to what has been repeatedly adjudged; and when the intent and meaning of a law has been settled by the uniform and consistent course of judicial construction, the construction becomes, in so far as contract and treaty rights acquired thereunder are concerned, as much a part of the law as the text itself."

Sala's Succession, Sup. Ct. La. 1898, 50 La. Ann. 1009, NICHOLLS, Ch. J.

"The parties protested on the ground that they were exempt under the treaty with Spain of 1795, and the decision of the court is stated in the syllabus (pp. 1009–1010), as follows:

"1. The parties designated by Act 130 of 1894 as those to be charged under its provisions with a succession or inheritance tax are foreign heirs and legatees.

"2. The words *personal goods* in the first clause of Art. XI of the treaty, entered into on the 27th of October, 1795, and proclaimed on the 2d of August, 1796, between the United States and Spain, refer to and cover *movable* property only. Real estate or immovable property is referred to and dealt with in the treaty only in its third clause.

"3. The only action taken by the two governments in respect to real estate, or immovable property, was to deal with and provide for the consequences of the special case, where foreigners in either country should be prohibited from inheriting immovable property. The effect of this limited action is to leave Act No. 130 of 1894 (unless unconstitutional) operative upon immovable property as against foreign heirs and legatees, except to the extent that it is controlled and limited under the third clause of the treaty, under the condition of affairs therein specially anticipated and provided for.

"4. Act No. 130 of 1894 is an act raising revenue and appropriating money, and should (under Art. 35 of the Constitution) have originated in the House of Representatives. Having originated in the Senate is decreed unconstitutional.

"5. There is nothing in the language of Act 130 of 1894 making the payment of a succession or inheritance tax by foreigners a condition precedent to a right of inheritance. The law permits the foreigner to inherit, but, having inherited, charges him with the tax. *Succession of Pargoud*, 13 An. 367; *Succession of Rabasse*, 49 An. 1405."

[5] The cases relate more to State police powers under the Fourteenth Amendment than as to treaty stipulations, but they are cited as they show the extent to which State laws will be upheld when they relate to the police power.

Spies vs. *Illinois*, U. S. Sup. Ct. 1887, 123 U. S. 131, WAITE, Ch. J.

On application for writ of error to the Supreme Court of the State of Illinois on behalf of certain men condemned to death, known as Chicago Anarchists, the writ was denied upon the ground that no federal question was raised, although the applicants contended that there were violations of treaty rights in

Court of the United States. The Supreme Court has, in regard to treaties, as it has in regard to Federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs and have not allowed either treaty stipulations or Federal statutes to be so construed as to prevent the proper exercise of police powers. The decision rendered by the Supreme Court and the opinion delivered by Mr. Justice Miller, in the *Slaughter House Cases*[1] will also stand, not only

the condemnation of the prisoners. The court, however, held that the point had not been raised.

The application was dismissed on various grounds, the record not being in all respects complete. As to the treaty point, the opinion says: "As to the suggestion by counsel for the petitioners, Spies and Fielden—Spies having been born in Germany and Fielden in Great Britain—that they have been denied by the decision of the court below rights guaranteed to them by treaties between the United States and their respective countries, it is sufficient to say that no such questions were made and decided in either of the courts below, and they cannot be raised in this court for the first time. Besides, we have not been referred to any treaty, neither are we aware of any, under which such a question could be raised."

Brooks vs. *Missouri*, U. S. Sup. Ct. 1888, 124 U. S. 394, WAITE, Ch. J.

This was a writ of error in a criminal case which was dismissed on the authority of *Spies* vs. *Illinois*. Treaty rights were not involved, but the doctrine in *Spies* vs. *Illinois* as to the supremacy of the State in legislation in regard to crimes was affirmed.

In re Kemmler, U. S. Sup. Ct. 1890, 136 U. S. 436, FULLER, Ch. J.

In re Shibuya Jugiro, U. S. Sup. Ct. 1891, 140 U. S. 291, HARLAN, J.

[6] *McKinney* vs. *Saviego*, U. S. Sup. Ct. 1855, 18 Howard, 235, CAMPBELL, J.

Baldwin vs. *Goldfrank*, Sup. Ct. TEXAS, 1895, 88 Tex. 249, GAINES, Ch. J. *Held* that the act of Feb. 8, 1850, of Texas, to investigate land grants in territory ceded to the United States under treaty of Guadalupe-Hildago, 1848, was not a violation of the treaty or an invasion of any right or reservation secured by the Constitution of the State or of the United States.

See also *Haver* vs. *Yaker*, U. S. Sup. Ct. 1869, 9 Wallace, 32, DAVIS, J.

§ 357.

[1] *The Slaughter House Cases*, U. S. Sup. Ct. 1872, 16 Wallace, 36, MILLER, J. In speaking of these cases Mr. Carson, in his History of the Supreme Court says (pp. 459–460): "It was held that the law in question was a police regulation for the health and comfort of the people entirely within the power of State Legislatures and unaffected either by the Constitution of the United States previous to the adoption of the Amendments, or since . . . This decision was severely criticised and in its defense Mr. Justice Miller, who always referred to it in terms of pride, said at an address delivered before the alumni of the Law Department of Michigan on the Supreme Court of the United States at the semi-cen-

as a monument of that learned jurist's legal acumen, but of the ability of the Court to discriminate between those powers which Congress can exercise and those powers which the States must be permitted to exercise even under the widest theories of Federal power.

The esteem with which the opinion in the *Slaughter House Cases* is held, and the salutary effect of that decision, has been referred to by Mr. Carson in his Centennial History of the Supreme Court, and a full quotation therefrom will be found in the notes to this section.[2] The decision has however, been

tennial celebration of the University, June 29th, 1887: 'Although this decision did not meet the approval of four out of nine of the Judges, on some points on which it rested, yet public sentiment, as found in the Press, and in the universal acquiescence with which it was received, accepted it with great unanimity, and although there were intimations that in the legislative branches of the Government the opinion would be reviewed and criticised unfavorably, yet no such thing has occurred in the fifteen years which have elapsed since it was delivered, and while the question of the construction of these Amendments, and particularly the Fourteenth, has often been before the Supreme Court of the United States, no attempt to overrule or disregard this elementary decision of the effect of the three new Constitutional Amendments upon the relations of the State Governments to the Federal Government has been made; and it may be considered now as settled that, with the exception of the specific provisions in them for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the States for that purpose, with the addition of the powers of the General Government to enforce those provisions, no substantial change has been made. The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States, and their power to regulate their domestic affairs, remain as the great features of our complex form of government.'" Mr. Carson says that this decision is a bulwark of State authority, the most important and substantial of those erected since the days of Taney, and Mr. Carson quotes the glowing terms in which Mr. John S. Wise of Virginia expressed himself in regard to this decision in his speech in reply to the toast of "The American Lawyer," at the breakfast given to the Justices of the Supreme Court of the United States by the Bar of Philadelphia, September 15, 1887:

[2] "I said that we owed more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of Constitutional liberty as that one decision of the Supreme Court in the *Slaughter House Cases*, declaring what of their ancient liber-

the subject of criticism by some writers whose views are also referred to in the notes.[3]

ties remained. That decision, worthy to live through all time for its masterly exposition of what the war did and did not accomplish, did more than all the battles of the Union to bring order out of chaos. . . . When war had ceased, when blood was stanched, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this Nation, when it spoke in the great decision of the *Slaughter House Cases*, planted its foot and said, 'This victory is not an annihilation of State Sovereignty, but a just interpretation of Federal power.' "

[3] On the other hand Mr. Justice Miller's decision has been criticized and commented upon by many writers on this subject. Wm. D. Guthrie, in his recently published monograph, says: "As what have been called the conservative—I would say almost hostile—views of Mr. Justice Miller were clearly in conflict with the intention of the framers of the amendment and for many years dwarfed and dulled the protective power of the amendment, it will be interesting to quote from some of the speeches in Congress, and thus realize the intention of the framers. There is, moreover, today in many quarters a remarkable misconception of the intention and purpose of the framers of the Fourteenth Amendment. The debates upon all these questions are most interesting and convincing, and should always be consulted. It has lately been declared that, 'Doubtless the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words.' But nevertheless, these debates are frequently referred to and are 'valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves.' "

Citing Blaine's Twenty Years in Congress, vol. 2, p. 419, as follows: "'The contentions which have arisen between political parties as to the rights of negro suffrage in the Southern States, would scarcely be cognizable judicially under either the Fourteenth or the Fifteenth Amendment to the Constitution. Both of those Amendments operate as inhibitions upon the power of the State, and do not have reference to those irregular acts of the people which find no authorization in the public statutes. The defect in both Amendments, in so far as their main object of securing rights to the colored race is involved, lies in the fact that they do not operate directly upon the people, and therefore Congress is not endowed with the pertinent and applicable power to give redress. By decisions of the Supreme Court, the Fourteenth Amendment has been deprived in part of the power which Congress no doubt intended to impart to it. Under its provisions, as construed by the Court, little, if anything, can be done by Congress to correct the evils or avert the injurious consequences arising from such abuses of the suffrage as distinguished the vote of Louisiana in the Presidential election of

§ 358. **California decision in conflict with general rules.** —There have also been cases in which State courts have refused to acknowledge the supremacy of treaties, but such instances are few. They are notably in California where an effort was made to uphold the anti-Chinese legislation, which was as we have seen, promptly suppressed by the Federal courts, even, however, earlier than the "Chinese epoch."

The Supreme Court of the State[1] laid down the rule which it attempted to support by decisions of the Supreme Court of the United States[2] that "A treaty is supreme only when it does not transcend certain limits and that it cannot supersede a State law which enforces or exercises any part of the State power not granted away by the Constitution."[3]

The same court, however, subsequently decided[4] that the treaty with Prussia of 1828 entitled Prussians to inherit, notwithstanding the State laws of California; two opinions were delivered in that case; one of the Justices declared that he could not see that any danger would result from yielding to the Federal Government the full extent of the powers which it might claim from the plain language, intent and meaning of the grant under consideration. The opinion

1868, and in the numerous flagrant cases which followed that baleful precedent of unrestrained violence and unlimited wrong. Those outrages are the deeds of individual citizens or of associated masses, acting without authority of law and in defiance of law. Yet when a violated public opinion justifies their course, and when indictment and conviction are impossible, the injured citizen loses his rights as conclusively as if the law had denied them, and indeed far more cruelly.'" Also citing:

"'Prof. Burgess's Political Sc. & Const. Law, vol. I, 225, et seq.: 'From whatever point of view I regard the opinion of the Court in the *Slaughter House Cases*,—from the historical, political, or juristic,—it appears to me entirely erroneous. It appears to me to have thrown away the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned.'" The Fourteenth Amendment, by William D. Guthrie, p. 21.

§ 358.

[1] *People* vs. *Naglee*, Sup. Ct. Cal. 1850, 1 Cal. 232, BENNETT, J.

[2] Citing the *Passenger* and *License Cases*, 5 How. 613; 7 How. 283. (See citations from, and comments on, these cases in §§ 468, *et seq.*, *post.*)

[3] See p. 246, 1 Cal. Rep.

[4] *People* vs. *Gerke*, Sup. Ct. Cal. 1855, 5 Cal. 381, HEYDENFETL and BRYAN, JJ.

contains the following statement as to the necessity of vesting this power in the Central Government:[5] "Upon some subjects the policy of a State Government, as shown by her legislation, is dependent upon the policy of foreign Governments, and would be readily changed from the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the General Government, and when effected the State policy must give way to that governmental agent of her foreign relations."

"The treaty-making power of the Federal Government must, from necessity, be sufficiently ample so as to cover all of the usual subjects of treaties between different powers. If we were to deny to the treaty-making power of our Government the exercise of jurisdiction over the property of deceased aliens, upon the ground of interference with the course of descents, or the laws of distribution of a State where property may exist; by parity of reasoning we should not make commercial treaties with foreign nations; because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the States of the Union.

"If the treaty-making power which resides in the Federal Government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, (since it is denied to the States,) and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands that protection which is most common amongst a majority of modern civilized nations."

Notwithstanding these opinions, however, the Supreme Court declared in in 1869,[6] that it was no answer in regard to congressional statutes to say that they had been enacted under the treaty-making power because "a treaty is but a part of the law of the land and what is forbidden by the Constitution can no more be done by a treaty than by an act of Congress," and, relying upon that declaration the court upheld certain laws of California which were appar-

[5] See pp. 325–6, 5 Cal. Rep.

[6] *People* vs. *Washington*, Sup. Ct. Cal. 1869, 36 Cal. 658, RHODES, J; see p. 668.

See also, however, *Bodley* vs. *Ferguson*, Sup. Ct. Cal. 1866, 30 Cal. 511, (see p. 517), SHAFTER, J.

ently repugnant to the Fourteenth Amendment, and the Civil Rights Bill.[7]

§ 359. **General rule, State statutes must give way when in conflict with treaty stipulations.**—The decisions of cases affecting State statutes and treaties show that in all instances the treaty-making power is supreme and that conflicting State statutes must yield, and that State statutes have been upheld only when it clearly appears that they are not in contravention of the treaty stipulations involved. In none of the cases reviewed in this chapter has the treaty-making power of the United States in any way been attacked or affected; the power exists, the treaties have always been declared valid; as to that point no question has been raised; the question for the Court has always been whether the statute conflicts with the treaty or whether it be so construed as to be consistent therewith, for only in such case can it be sustained.[1]

[7] Many of the cases involving questions under the first section of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Bill are applicable to cases involving the usual treaty stipulations in regard to according to citizens of the other nation the same rights that are accorded to citizens of the United States. The Fourteenth Amendment provides: "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

For exhaustive collections of cases on the subjects involved in the preceding clause of the Constitution, see Lectures on the Fourteenth Article of Amendment to the Constitution of the United States by William D. Guthrie, Boston, 1898; also, A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States by Henry Brannon, Judge of the Supreme Court of West Virginia, Cincinnati, 1901.

It can readily be seen that decisions as to whether or not State laws are Constitutional as viewed in the light of the Fourteenth Amendment would be applicable in many respects to questions affecting rights guaranteed by the Federal government under treaty stipulations to citizens of foreign governments.

§ 359.

[1] *Fisher* vs. *Harnden*, U. S. Cir. Ct. N. Y. 1812, 1 Payne, C. C. 55, LIVINGSTON, J. (Afterwards re-

Having thus shown that the supremacy of treaties over all State statutes conflicting therewith has not only been upheld by the Federal courts, but has been universally recognized by the State courts, in the next chapter we will review the decisions of the Courts in regard to the relations of congressional legislation and treaties; we will find that the Courts necessarily determine questions in that branch of the subject from an entirely different standpoint on account of the acknowledged equality of statutes and treaties of the United States under Article VI of the Constitution.

versed in *Harnden* vs. *Fisher*, U. S. Sup. Ct. 1816, 1 Wheaton, 300, 62 | MARSHALL, Ch. J., but treaty and State statute point not affected.)

CHAPTER XII.

DECISIONS OF FEDERAL COURTS IN REGARD TO THE RELATIVE EFFECT OF TREATY STIPULATIONS AND CONGRESSIONAL ACTION.

SECTION

360—Decisions in preceding chapter relate to State legislation.

361—Different rules applicable to questions arising from conflicting treaty stipulations and congressional legislation.

362—Different resulting effects of congressional action upon treaties classified.

363—Necessity of legislation to make treaties effectual.

364—Treaties as contracts and as laws; Chief Justice Marshall's views in *Foster* vs. *Neilson*.

365—Treaties when self-operating and when legislation required.

366—Treaty stipulations and tariff statutes.

367—*Taylor* vs. *Morton;* opinion of Justice Curtis.

368—*Taylor* vs. *Morton;* violations of treaties.

369—Treaty stipulations and tariff laws; *Whitney* vs. *Robertson*.

370—Other treaty stipulations as to tariff; necessity for legislation.

371—Summary of treaty and tariff decisions.

372—Treaty-making power cannot appropriate money.

373—*Turner* vs. *Am. Bap. Miss. Union;* Justice McLean's opinion as to appropriations.

SECTION

374—Treaty stipulations at times self-operative; the British prisoners; Justice Woodbury's opinion; the *Metzgar* cases.

375—Practical difficulties removed by legislation.

376—Rights of individuals under treaty stipulations; *Head Money* cases.

377—Chief Justice Marshall's rule in *Foster* vs. *Neilson* reiterated.

378—Treaties and statutes; the latest prevails; the *Cherokee Tobacco;* Justice Swayne's opinion.

379—Statutes which violate treaties; difference between State and United States statutes in this respect; the Chinese exclusion laws.

380—Wide scope of decisions in *Chinese Exclusion* cases.

381—Summary of decisions in cases involving Congressional legislation as to Chinese immigration.

382—Termination of war by treaty of peace.

383—When treaties take effect, as to governments and as to individuals.

384—Abrogation of treaties; various methods.

385—Direct abrogation by Congressional action.

386—Abrogation by implication; *Ward* vs. *Race Horse*.

SECTION
387—Repeals and abrogations by implication not favored.
388—Right of abrogation in general.
389—These views applied to Clayton-Bulwer treaty.
390—Congressional legislation to carry out treaty stipulations; Justice Field's opinion in the *Ross* case.
391—The construction of treaties.

§ 360. **Decisions in preceding chapter relate to State legislation.**—The only decisions cited in the preceding chapter are those which relate to the supremacy of the treaty-making power of the United States, so far as State legislation is concerned, and which also demonstrate that State legislation, whether enacted prior to the treaty, or subsequently thereto, must give way whenever it conflicts with the plain import of treaty stipulations; that is to say it has been decided that the United States, as to any matter which is within the scope of the treaty-making power, can practically repeal, and render inoperative any existing, or subsequently enacted State laws which conflict with the provisions of a treaty.

In fact, it must be conceded that the cases cited in the last chapter in which treaty stipulations have so operated as to practically change, or nullify, State laws of succession and inheritance, and in which they have rendered nugatory anti-Chinese legislation, show beyond all peradventure that State laws are in all respects subordinate to the treaty-making power of the Central Government.[1]

§ 361. **Different rules applicable to questions arising from conflicting treaty stipulations and congressional legislation.**—An entirely different condition, however, exists as to the relative effects of treaty stipulations and *congressional legislation;* the decisions which will be cited in this chapter show that while a treaty can supersede a prior act of Congress, on the other hand a subsequent act of Congress may supersede a prior treaty, either by rendering it ineffect-

§ 360.

[1] Except in those instances in which the police powers and taxing of the State have been sustained; (see §§ 356, *et seq.*, pp. 48, *et seq.*, *ante*) and even in those cases the state acts have been closely scrutinized by the Courts.

ual or by abrogating it; in fact, the courts, in construing Article VI of the Constitution have declared that the statutes enacted by Congress, and the treaties made in pursuance of the Constitution, having been placed upon the same plane, are necessarily co-ordinate in strength, and in case of conflict they must be construed as though they were both statutes, and the latest utterance must be taken as the law of the land; the courts, however, always observe the elementary rule of construction that two existing laws must be construed so as to operate jointly if possible, the later one superseding the earlier in case it is impossible for them to co-exist consistently.

§ 362. **Different resulting effects of congressional action upon treaties classified.**—The cases that must be examined in considering this element of the treaty-making power may be divided into three classes; *first*, cases in which it has been held that treaties duly made and ratified are yet inoperative because Congress has not passed the appropriate legislation to carry them into effect; *second*, cases in which a later statute conflicting with the stipulations of a prior treaty has been held to supersede it so far as the municipal laws of this country are concerned; and, *third*, cases in which it has been held that Congress has abrogated an existing treaty, either by direct legislation to that effect or by implication through the enactment of legislation wholly inconsistent therewith. In the following sections they will be treated generally in the above order, although no particular classification will be attempted, as cases frequently fall within more than one class.

§ 363. **Necessity of legislation to make treaties effectual.**—The position taken by the House of Representatives that, while it disclaims any right to participate in the actual making of a treaty, it must unite with the Senate in enacting Congressional legislation to carry those stipulations which are not self-operative into effect, has finally been definitely accepted by all the departments of the Federal Government;[1] it has become the settled custom as soon as a treaty has been ratified to introduce the proper bills in the Senate or the

§ 363.

[1] See §§ 296 *et seq.*, pp. 429 *et seq.*, Vol. I.

House—always in the House of Representatives, so far as appropriations of money are concerned—so that the necessary and proper legislation to carry it into effect may be enacted; the courts have decided that treaties which require such legislation remain inoperative until the statutes have been enacted and that officers of the government must continue to follow the statutes, or the municipal law of the land, even if inconsistent with, or in violation of, the stipulations of a treaty, until Congress shall have so changed the statute law that the Executive Department can execute it in conformity with the provisions of the treaty.[2]

Although, as stated in an earlier chapter, the treaty of 1794 with Great Britain, as well as other treaties referred to, called forth long debates in the House of Representatives as to the extent of the legislation required, the necessary laws were enacted and no occasion arose for the courts to determine what the effect would have been had such legislation not been enacted.[3]

§ 364. **Treaties as contracts and as laws; Chief Justice Marshall's views in Foster vs. Neilson.**—An opinion upon this subject was delivered by Chief Justice Marshall in 1829 in which he declared that a treaty is practically a contract addressing itself to the political side of the government, and not to the judicial side, and is in all respects to be regarded as the law of the land and as such equivalent to an act of legislature when it operates of itself without any legislative provisions, to which he added these significant words which have been quoted since then on numerous occasions: "but when the terms of the stipulations import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature (Congress) must execute the contract before it can become a rule for the court."[1] This utterance as it was then expressed and as it has since been re-iterated, forms the bulwark behind which the courts have intrenched themselves, and while refusing to construe treaties

[2] See treaty and tariff cases in §§ 366 *et seq.* of this chapter *post.*

[3] See § 295, p. 429, Vol. I.

§ 364.

[1] *Foster & Elam* vs. *Neilson*, U. S. Sup. Ct. 1829, 2 Peters 253, MARSHALL, Ch. J., and see § 377 *post.*

as statutes until Congress shall have acted upon them, have protected themselves from all charges of violating, by judicial action, the good faith of the nation by throwing the burden of responsibility upon Congress for its own non-action, or improper action, as the case may be, in case foreign nations with whom treaties have been made shall claim that the law is not administered in accordance with stipulations therein contained, and for which valuable concessions may possibly have been given to the citizens of the United States.

§ 365. **Treaties when self-operating and when legislation required.**—The opinion in *Foster* vs. *Neilson* shows, however, that the Chief Justice foresaw that though cases might arise in which the court, could not follow the treaty on account of conflicting legislation, that there would be instances in which legislation would not be required to make the treaty operative; in those cases he declared that the courts could regard it as the law of the land. The question, therefore, which always is presented to the court for its decision in regard to the construction and operation of a treaty, where there is either legislation conflicting with it, or no subsequent legislation carrying it into effect, is whether or not the treaty stipulations involved require legislation to make them operative or whether they are self-operative, and also whether or not any subsequent legislation conflicts therewith, so as to render them inoperative or abrogated in whole or in part.

The Supreme Court of the United States has just decided that as soon as territory ceded by a treaty has been delivered to the United States, the treaty becomes operative, and without further legislation the territory ceases to be foreign so far as revenue laws are concerned.[1]

§ 366. **Treaty stipulations and tariff statutes.**—Questions of this nature have been raised and determined quite frequently in tariff cases, in which importers have claimed rebates of duties on merchandise imported from countries with which the United States has entered into reciprocal tariff

§ 365.

[1] *De Lima* vs. *Bidwell* (*Insular Cases*), U. S. Sup. Ct. 1901, 182 U. S. 1, BROWN, J., and see § 61*b*, p. 119, Vol. I, and also INSULAR CASES APPENDIX at end of Volume I (note dissenting opinions of MCKENNA, WHITE, SHIRAS and GRAY, JJ.). For effect of treaties of cession, see chap. XIII, *post*.

relations, on the ground that the duties exacted were in excess of those stipulated by the treaty, although Congress had not passed statutes modifying the tariff to accord with such stipulations, and in the manner claimed by the importers.[1]

§ 367. **Taylor vs. Morton, opinion of Justice Curtis.**—Mr. Justice Curtis of the Supreme Court, while sitting as Circuit Judge in Massachusetts in 1855, rendered an opinion which has always been regarded as a leading authority, and which the Supreme Court practically accepted as the decision and opinion of that Court in affirming the case on appeal.[1] In this case merchants claimed, that under the treaty of 1832 with Russia, importers were entitled to certain reductions in duties on hemp which were not allowed under the then existing tariff laws, as they were executed by the Customs' Officers of the United States; that the exaction of duties according to the schedules in the tariff act, and not according to treaty stipulations was a violation of the treaty, or contract with Russia, and that the Courts could compel the Executive Department of the Government to modify its action so as to comply with the provisions of the treaty regardless of existing statutes; they also claimed that as a treaty is the supreme law of the land it was as equally binding on all officers of the United States as the tariff law itself. Mr. Justice Curtis, following the views of Chief Justice Marshall, held that a promise in a treaty addresses itself to the political, and not to the judicial, department of the Government, and that the Courts could not try the question whether the treaty had been observed or had been violated, but that it was a question for Congress to reduce the duty or to continue the exaction of the higher rate of duty, whether it was a violation of the treaty or not; he also further held that although a treaty were the law of the land, Congress might repeal it *so far as it is a municipal law* providing the subject-matter were within the legislative power of Congress.

§ 368. **Taylor vs. Morton; violations of treaties.**—As to

§ 366.

[1] All the cases cited under the remaining sections of this chapter should be examined.

§ 367.

[1] *Taylor* vs. *Morton*, U. S. Cir. Ct. Mass. 1855, 2 Curtis, 454, CURTIS, J, affirmed U. S. Sup. Ct. 1862, 2 Black, 481, CLIFFORD, J.

the effect of violating the treaty by either failing to enact the necessary legislation to carry it into effect, or by the actual enactment of legislation contrary to the spirit of the treaty, the opinion says: "Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the view and acts of a foreign sovereign, manifested through his representative has given just occasion to the political departments of our goverment to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows, that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government. On the other hand, if it be admitted that Congress has these powers, it is wholly immaterial to inquire whether they have, by the Act in question, departed from the treaty or not; or if they have, whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the Act in question they have not departed from the treaty, the plaintiff has no case. If they have, their Act is the municipal law of the country and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the Constitution, to judge of its grounds, and act as may be suitable and just."[1]

§ 369. **Treaty stipulations and tariff laws; Whitney vs. Robertson.**—The rule laid down in *Taylor* vs. *Morton*, has been followed consistently by the courts ever since; one or two other cases only will be referred to in the text, others will be found in the notes.[1] The Supreme Court in 1888, again

§ 368.
[1] 2 Curtis C. C. p. 461.

§ 369.
[1] See pp. 72, *et seq.*, *post.*

laid down the rule as to the effect of treaties on tariff law, as appears by the following utterance of that eminent authority on constitutional law, Mr. Justice FIELD:[2] "The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be forced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protec-

[2] *Whitney* vs. *Robertson*, U. S. Sup. Ct. 1888, 124 U. S. 190, FIELD, J.; affirming same case, U. S. Cir. Ct. S. D. N. Y. 1884, 21 Fed Rep. 566.

tion of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance."

§ 370. **Other treaty stipulations as to tariff; necessity for legislation.**—The treaties with Great Britain of 1854, and of 1871, not only contained stipulations as to promised reciprocal modifications of the existing tariffs, of the United States and Canada, but mutual stipulations were also made as to the future regulation of fisheries, canals, etc.; in all of those cases it was necessary for Congress to pass new laws carrying out the treaties or to repeal or amend existing statutes, before the treaties became operative; the same rule was applicable to the various Canadian Provinces, Great Britain having agreed to request them to enact similar legislation; as to those provisions the treaty could not be enforced in Canada any more than it could in this country without such legislation.[1] The proclamation of the President issued July 1st, 1873,[2] shows that the Executive Department of the Government of the United States did not consider that the treaty of Washington of 1871 went into effect, until upwards of two years had elapsed after it had become "the supreme law of the land," so far as all those matters which required no legislation to make it effectual were concerned.[3]

§ 371. **Summary of treaty and tariff decisions.**—The rule laid down by Mr. Justice Curtis in *Taylor* vs. *Morton*[1] seems to be the best exposition of the law in regard to treaty stipulations and tariff statutes, and the rights of importers thereunder, so far as the courts are concerned.[2] Some addi-

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[1] See § 123, p. 213, Vol. I.

[2] Richardson's Messages of the Presidents, vol. VII, p. 228.

[3] *One Hundred and Thirty-Four Thousand Feet of Pine Lumber*, U. S. Dist. Ct. N. D. N. Y. 1858, 4 Blatchf. 182, NELSON, J.

United States vs. *Hathaway*, U. S. Sup. Ct. 1866, 4 Wallace, 404, NELSON, J.

United States vs. *Quimby*, U. S. Sup. Ct. 1866, 4 Wallace, 408, NELSON, J.

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[1] *Taylor* vs. *Morton*, U. S. Cir. Ct. Mass. 1855, 2 Curtis, 454, CURTIS, J.; affirmed, U. S. Sup. Ct. 1862, 2 Black, 481, CLIFFORD, J.; and see §§ 367, *et seq.*, pp. 67, *et seq.*, *ante*.

[2] See note on p. 458, *post*.

tional cases are referred to in the notes.[8] The liability of this government to citizens of a foreign government with

[8] TREATY AND TARIFF CASES.

THE SUGAR CASES.

Bartram vs. *Robertson*, U. S. Cir. Ct. S. D. N. Y. 1883, 21 Blatchf. 211, 15 Fed. Rep. 212, WALLACE, J., (affirmed U. S. Sup. Ct. 1887, 122 U. S. 116, FIELD, J.).

The treaty with Denmark of 1826 provides that no higher or other duties shall be imposed on articles, the produce of Denmark imported into the United States, than shall be payable on like articles, the products of any other foreign country. In 1875 a treaty was made with the Hawaiian Islands providing for the free entry into the United States of Hawaiian sugar and molasses to take effect whenever congress should pass the necessary legislation which was done in 1876. Duties under the general tariff law continued to be exacted on sugar and molasses brought from the Danish West Indies against the protest of the importers who claimed they were entitled to free entry by reason of the provisions of the treaty, and the subsequent removal of duties on similar sugar from Hawaii. The court held that Congress had power to annul this treaty and that it had power to pass a general tariff law which would supersede it and relied upon the case of *Taylor* vs. *Morton*, 2 Curtis, 454, for authority that the treaty with the Hawaiian Islands did not in any way modify the tariff act, except as to Hawaii. The court also held that the stipulation in the Danish treaty referred to a general levying of duties with foreign nations and not to the particular relations with one country.

In this respect the Circuit Judge said in his opinion (21 Blatch. 216):

"The meaning of the stipulation is, that there shall be no unfriendly discrimination, in the imposition of duties, between the products of Denmark and those of other countries. The stipulation is satisfied when there is no discrimination, according to the rule and policy observed with foreign nations in general. The plaintiff's argument involves the assumption that the exception is to be deemed the general rule. There is a broader view of the controversy, however, which cannot be slighted. Stipulations like the one relied on are found in upwards of forty treaties made between the United States and foreign powers since 1815. Without attempting an enumeration, it suffices to say, there is a similar stipulation in the treaty with Prussia, with Sweden and Norway, with the Two Sicilies, with Portugal, with Nicaragua, with Hayti, with Honduras and with Italy, all of which were in force when Congress enacted the present tariff act. If the argument for the plaintiffs is sound, all these treaty stipulations are to be deemed embodied in the tariff act, so as practically to exempt from duty the importations of all these foreign countries, whenever the products of a single country may be exempted from duty. Can it be for a moment supposed that a stipulation in a treaty with a single power, exempting the products of that country from the payment of duty when im-

which treaty stipulations have been made and which this government has not fulfilled, is an entirely different question.

ported here, made in the interest of our own commerce or manufactures, or founded upon special considerations of comity between the two nations, could be intended to affect such a far-reaching abrogation of our own revenue laws as would thus ensue? The proposition is too startling to be entertained."

Netherclift vs. *Robertson*, U. S. Cir. Ct., S. D. N. Y. 1886, 23 Blatchford, 546; 27 Fed. Rep. 737, COXE, D. J.

This was a case involving the right of the United States to continue to collect duties on sugar brought from the Dominican republic, at the regular tariff schedule, notwithstanding the existence of the treaty of 1857 that no higher duty should be charged on products of that government than were charged on similar products of other governments, and the subsequent treaty with Hawaii in 1876 for the free admission of sugar from the territory of that government.

The case is almost identical with that of *Bartram* vs. *Robertson* (15 Fed. Rep. 213, 21 Blatchf. 211, affirmed U. S. Supreme Court, 122 U. S. 116), where the same issue was involved, except as to sugar brought from the Danish West Indies, a similar clause existing in the treaty with Denmark of 1827.

In deciding this case the opinion is expressed (pp. 548–549), as follows:

"In *Bartram* vs. *Robertson* (21 Blatchf. C. C. R. 211), this court decided that Congress has power to annul a treaty, so far as it operates as a rule of municipal law; that the provisions of the Danish treaty, (8 U. S. Stat. at Large, 340,) which are similar to those now in question, and which, it was argued, admitted the productions of Denmark on the same terms as those of the Hawaiian Islands, could not be enforced, because, subsequent to the treaty, Congress had imposed duties upon all sugar and molasses of designated grades. The general law included Denmark, and her products could not, therefore, be admitted free without an express legislative enactment.

"The court held, also, that, even though the provisions of the Danish treaty were incorporated in the tariff law, it would not change the result, the fair meaning of the stipulation being, that there should be no unfriendly discrimination against Denmark, and there is none when she is placed on an equal footing with all foreign nations, with one exception only."

THE OPIUM CASE.

Powers vs. *Comly*, U. S. Sup. Ct. 1879, 101 U. S. 789, WAITE, Ch. J.

Under the act of 1872, opium, the produce of Persia, when imported, from a country west of the Cape of Good Hope, to the United States, was subjected to an additional duty of 10 per cent *ad valorem;* certain importers claimed that this was in conflict with the provisions of the treaty with Persia. The Supreme Court decided that the duty was not a violation. The entire opinion is as follows:

"This case is substantially disposed of by *Hadden* vs. *The Collector*,

Such claims would have to be presented to the State Department by the proper department of the foreign government

5 Wall. 107 and *Sturges* vs. *The Collector*, 12 id. 19. Section 3 of the act of June 6, 1872, 17 Stat. 232, is in all material respects like the statutes under consideration in those cases where we held that countries 'beyond the Cape of Good Hope' and countries 'east of the Cape of Good Hope' meant countries with which, at that time, the United States ordinarily carried on commercial intercourse by passing around that Cape. Although the act of 1872 was passed after the Suez Canal was in operation, we see no indication of an intention by Congress to give a new meaning to the language employed which had already received a judicial construction. The words used are words of description and indicate to the popular mind the same countries now that they did before the course of trade was to some extent changed by cutting through the Isthmus of Suez. The object of Congress was to encourage a direct trade with these Eastern countries. For this purpose, in legal effect, a bounty was offered to those who imported the products of that region directly from the countries themselves, instead of from places west of the Cape.

"We see nothing in the act of Congress which is in conflict with the treaty with Persia. 11 Stat. 709. If the subjects of Persia export their products directly to the United States, they are required to pay no more duties here than the 'merchants and subjects of the most favored nation.' It is only when their products are first exported to some place west of the Cape, and from there exported to the United States, that the additional duty is imposed. Under such circumstances, the importation into the United States is not, commercially speaking, from Persia, but from the last place of exportation."

THE RUSSIAN HEMP CASE.

Ropes vs. *Clinch*. U. S. C. C. S. D. N. Y. 1871, 8 Blatchf. 304, WOODRUFF, Cir. J.

This was an action against the collector to recover back duties paid on raw Russian hemp, based on the equal duty clause in the treaty with Russia of 1832.

Russian hemp by the tariff act of 1861 was charged forty dollars per ton; manila and other hemps of India twenty-five dollars per ton.

It was a jury case, and the court orally instructed the jury to find for the defendant, and sustained the right under the tariff act to collect a larger duty. In the course of his charge the judge referred to the right of Congress to legislate disregarding a treaty, as follows:

"Our system of government divides itself into three departments,—legislative, executive and judicial—and the supreme power of legislation, subject only to the Constitution, is vested in the legislature. They legislate, and thereby affect all rights and privileges, and impose all restrictions and obligations upon our own citizens, and upon the citizens of other nations who come within the influence of our laws, subject to the responsibilities of this Government, in its national character, for any breach of its faith with foreign nations; and that legislation is binding

and the rules affecting them are more properly the subject of a work on international law than of one of this nature.

upon the judicial tribunals, and must be respected and enforced by them. If, then, Congress, by legislation inconsistent with a treaty, creates a rule of conduct for its citizens, a rule for the guidance of its Courts, the only question is—has it enacted a law which operates to annul, or operates in disregard of, the provisions of a treaty? As I before observed, if this act does neither, then there is no question here. If it does either or both, then it seems to me within the constitutional power of Congress, and to be binding and conclusive.

"To avoid this view of the subject, the suggestion is, that the Court should not hold the treaty affected by the legislation, if satisfied, by means of which the Court can judicially take notice, that such was the intention of Congress—if satisfied that Congress, when they passed this statute, did it without having the treaty under actual consideration, and had no intention to violate its provisions, entertaining, so far as the subject was, in any technical sense even, before them, the purpose to maintain the treaty in its full vigor. The Court is thus called upon to say, in this case, nothing less, than that the law in question was wholly inoperative: for, there is nothing in the act imposing any duty upon Russia hemp, except the clause which declares that it shall be charged with a duty of forty dollars per ton. In a word, it unequivocally declares that the duty on Russia hemp shall be forty dollars, and, if it be not liable to that, it is liable to no duty. If the Court can inquire into the intention of the legislature, and be so brought to reach the conclusion that, while they passed that act, they nevertheless intended to preserve the treaty with Russia—in fact, that they intended that the duty on Russia hemp should not be greater than upon that of any other country—then the act of Congress becomes a nullity. For, if the words 'forty dollars' be struck out of the enactment, nothing remains imposing any duty on Russia hemp. I am, therefore, as it seems to me, called upon to declare, that the legislation which has been had was entirely inoperative, because Congress did not intend to pass a law which should be inconsistent with the terms of the treaty. In other words, although Congress has passed an act in explicit terms, of no doubtful meaning, susceptible of but one interpretation, this court is at liberty to declare that such law has no effect, and to refuse to regard it, because convinced that Congress did not intend that it should have the effect which necessarily follows from enforcing it. It is not within the scope of judicial inquiry to ask, in such a case, what was the intention of Congress for any such purpose; and the Court cannot be influenced by any such convictions.

"There are three modes in which Congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal

§ 372. Treaty-making power cannot appropriate money. —It has also been settled that the treaty-making power of

abrogation of the treaty at once, by express terms; and even where, as in this case, there is a provision for the notice, I think the Government of the United States may disregard even that, and declare that 'the treaty shall be, from and after this date, at an end,' and meet the consequences of their responsibility for a breach of faith with the Russian Government. And yet, while I state that as my judgment of the legal proposition I am not thereby intimating that it is a thing proper to be done, or that such a proposition can be presumed to be entertained by our Government, or, if at all, except upon exigencies and under the pressure of considerations of state, of such importance and necessity as compels a departure from good faith. But, as a legal proposition, I suppose it is possible in that way to destroy the legal operation of a treaty. So, they may render it inoperative by legislation in contradiction of its terms, without formal allusion at all to the treaty; and, generally, they may legislate as if no such treaty existed, in modification or alteration of what, by force of the treaty, has been the law heretofore, thus modifying the law of the land, without denying the existence of the treaty, or the obligations thereof between the two Governments, as a contract, and answer therefor to such foreign Government, or meet its reclamation or retaliation as may be necessary."

THE PORTUGUESE TONNAGE CASE.

Oldfield vs. *Marriot*, U. S. Sup. Ct. 1850, 10 Howard, 146, WAYNE, J.

This was one of the earliest cases involving the apparent conflict of treaties and tariff or tonnage statutes. The question involved, and points decided, are stated in the syllabus, as follows:

"The second article of the treaty between the United States and Portugal, made on the 26th of August, 1840 (8 Stat. at Large, 560), provides as follows, viz:

"'Vessels of the United States of America arriving, either laden or in ballast, in the ports of the kingdom of Portugal, and, reciprocally, Portuguese vessels arriving, either laden or in ballast, in the ports of the United States of America, shall be treated, on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place, with respect to the duties of tonnage, lighthouse duties, pilotage, port charges, as well as to the fees and perquisites of public officers, and all other duties and charges of whatever kind or denomination, levied upon vessels of commerce, in the name or to the profit of the government, the local authorities, or any public or private establishment whatever.'

"This article is confined exclusively to vessels. It does not include cargoes, or make any provision for an indirect trade,—that is, it does not provide for the introduction of articles which are the growth, produce, or manufacture of some third country, into the ports of Portugal in American vessels upon the same terms upon which they are introduced in Portuguese vessels or the introduction of such articles into

the United States does not extend to appropriations of money required to fulfill treaty stipulations; every treaty which has ever been ratified in which the United States has engaged to pay a sum of money to any foreign country or citizens thereof has been fulfilled; this result, however, has not been accomplished by the self-operating effect of the treaty stipulations, but by statutory enactments, originating in the House of Representatives, and passed in the regular manner by a majority of both Houses of Congress, appropriating the necessary funds from the Treasury of the United States to carry out the treaty stipulations, as specified in the Acts of Congress. We have already referred to the instances in which payments were made for the cessions of Alaska[1] and the

ports of the United States in Portuguese vessels upon the same terms upon which they are introduced in American vessels. These classes of cases are left open to the legislation of each country.

"The Tariff Act of Congress passed on the 30th of July, 1846, has the following section: 'Schedule 1. (Exempt from duty.) Coffee and tea, when imported direct from the place of their growth or production, in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges.'

"The treaty with Portugal is not one of those referred to in this paragraph.

"Consequently, a cargo of coffee, imported from Rio Janeiro in a Portuguese vessel, was subject to a duty of twenty per cent, being the duty upon non-enumerated articles.

"An historical account given of the course pursued by the government of the United States, showing that, since the year 1785, it has been constantly endeavoring to persuade other nations to enter into treaties for the mutual and reciprocal abolition of discriminating duties upon commerce in the direct and indirect trade."

The opinion gives an exhaustive résumé of United States legislation in favor of liberal commercial relations with foreign nations; and see also note at end as to effect on Great Britain and removal of restrictions.

OTHER CASES.

North German Lloyd Steamship Co. vs. *Hedden, Collector; Same* vs. *Magone, Collector*, U. S. Cir. Ct. N. J. 1890, 43 Fed. Rep. 17, WALES, J.

Thingvalla Line vs. *United States*, U. S. Ct. Claims 1889, 24 Ct. Claims, 255, RICHARDSON, J., and see *Head Money Cases* cited under § 376, *post.* See also other tariff cases cited under §§ 367–370, *ante.*

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[1] See §§ 305, 306, pp. 438, 439, Vol. I.

Philippines[2] and the same practice has been followed in every case in which money payments have been required.

This has been so generally recognized that there has not been but few occasions for testing the matter in the courts; there are judicial decisions, however, that money cannot be appropriated under the treaty-making power.[3]

§ 373. **Turner vs. Am. Bap. Miss. Union; Justice McLean's opinion as to appropriations.**—A leading case[1] on this point was decided by Mr. Justice McLean of the Supreme Court, while sitting at circuit; although the treaty involved in the action was with an Indian tribe, the rule as stated applies to all treaties. In regard to the effect of treaties and the treaty-making power, the opinion says: "A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of the money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that the treaty which engages to pay a sum of money, is in itself a law.

"And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power.

[2] See § 308, pp. 441 *et seq.*, Vol. I.

[3] See cases cited under § 373.

§ 373.

[1] *Turner* vs. *Am. Bap. Miss. Union*, U. S. Cir. Ct. Michigan, 1852, 5 McLean, 344 (see p. 347), McLEAN, J., Federal Cases, 14,251, see also other cases;

Utah M. & Mfg. Co. vs. *Dickert & M. Sulphur Co.*, Sup. Ct. Utah, 1889, 6 Utah, 183, JUDD, J.

In re Shong Toon, U. S. Dist. Ct.

It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

"Without a law the President is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty, in fact, appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of Congress was passed."

§ 374. **Treaty stipulations at times self-operative; the British prisoners; Justice Woodbury's opinion; the Metzgar Cases.**—There are, however, cases in which the courts have held, as expressed in Chief Justice Marshall's opinion in *Foster* vs. *Neilson*,[1] that the treaty addresses itself to the judicial side of the government, and that when it does so it is to be regarded as the supreme law of the land and administered with the same force and effect as though it were a statute without further congressional action.

In a case in 1845 in which the extradition clauses in the Great Britain treaty of 1842 were under consideration, certain prisoners, who were brought up on *habeas corpus* proceedings, claimed that their arrest and delivery to the British authorities was without any warrant in law, notwithstanding the provisions of the treaty, because, as no legislation had been enacted at that time, to carry the extradition provisions into effect, those clauses were therefore inoperative, and the Executive Department of the government was as powerless to act under them as though the treaty did not exist[2]; Judge Woodbury remanded the prisoners refusing

Cal. 1884, 10 Sawyer, 268, HOFFMAN, J.

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[1] See § 364, p. 66, *ante*, and § 377, p. 84, *post*.

[2] *The British Prisoners*, U. S. Cir. Ct. Mass. 1845, 1 Wood. & Min. 66 (see p. 73), WOODBURY, J. Also reported as *In re Thomas Sheazle*.

Other cases on this point are:

Respublica vs. *Gordon*, Sup. Ct. Penna. 1788, 1 Dall. 252, MCKEAN, J.

Blandford vs. *State*. Tex. Ct. App. 1881, 10 Texas Crim. Cas. 627. HURT, J.

Castro vs. *De Uriarte*, U. S. Cir. Ct. S. D. N. Y. 1883, 16 Fed. Rep. 93, p. 97, BROWN, J.

to interfere with their surrender, holding that no legislation was necessary, as the treaty expressly provided that a certificate should be made by the proper executive authority to the proper officers in order that a warrant might issue by them for the surrender of the fugitives, and, therefore, the treaty to this extent was self-operative. "Now, if a treaty stipulated for some act to be done, entirely *judicial*, and not provided for by a general act of Congress, like that before cited, as to examinations such as here before magistrates, it could hardly be done without the aid or preliminary direction of some act of Congress prescribing the Court to do it, and the form.

"But where the aid of no such act of Congress seems necessary in respect to a ministerial duty, devolved on the executive, by the supreme law of a treaty, the executive need not wait and does not wait for acts of Congress to direct such duties to be done and how.

"There is no appropriation of money required, so as to raise the question, formerly much discussed, as to the power of the House of Representatives, in such cases, being either concurrent or merely declaratory.

"Nor is there any special form, or assignment of authority, to be exercised here, which requires detailed provisions by legislation, beyond what is so unusually full in this treaty itself. See on this the debates as to Jay's Treaty, and the convention with England of 1818.

"A case, where an act of Congress has been deemed necessary to aid the executive in enforcing treaties, is one passed 2d March, 1829, ch. 41 (4 Stat. at Large, 359), for imprisoning deserters from foreign vessels, drawn up by myself. And there are several, where appropriations of money are necessary, and some, changing duties on imports, to conform to treaties.

"It is here only on the ground, that the act to be done is chiefly ministerial, and the details full in the treaty, that no act of Congress seems to me necessary. Bee's Ad. 286, 287. See further, 1 Bl. Com. Apd. by Tucker, 1 to 5."

The same rule, however, was adopted by Judge Betts in a case in New York State which is referred to in the notes

to this section, although Judge Edmonds of the State Court decided the same case diametrically opposite.[3]

§ 375. **Practical difficulties removed by legislation.**— Questions of this nature so far as they relate to the execution of extradition treaties have been obviated by the passage of the act of 1848, which applies generally to all extradition treaties so that the points decided by Judges Woodbury, Betts and Spencer are not now likely to be raised as the act of 1848 and the subsequent acts in regard to procedure in extradition cases, together with the provision of the Revised Statutes, clothe the Executive with power to execute all ex-

[3] *Metzgar, In re*, 5 Howard, 176, U. S. Sup. Ct. 1847, McLEAN, J.; U. S. Dist. Ct. S. D. N. Y. 1847, Fed. Cas. 9511, BETTS, J.; N. Y. Supp. Ct., 1847, 1 Barbour, 248, EDMONDS, J.

These cases all relate to proceedings on writs of *habeas corpus* on behalf of the petitioner who was arrested and held for extradition under the treaty with France, of 1843.

He was arrested under a second mandate and was about to be delivered to the authorities of France when he obtained a writ of *habeas corpus* before the District Judge, who, after a long review of all of the law relating to extradition, held that the provisions of the treaty became a rule of law and could be carried into effect by the courts without other direction of the legislature. And that a treaty being of equal force with an act of Congress it required no special legislation to carry it into effect and he remanded the prisoner.

Thereupon a petition was made to the Supreme Court for a writ of *habeas corpus* and Mr. Justice McLean held that it was not within the jurisdiction of the Supreme Court to review the District Judge.

The petition was denied and no writ was issued.

Subsequently Metzgar sued out a writ in the New York State Supreme Court, on the ground that he was improperly held, and Judge Edmonds in a long opinion, held that the President of the United States had no right under the treaty to act until there was legislation, and that the treaty did not become operative until after Congress had not only ratified it, but proposed the necessary legislation.

As a result he discharged the prisoner who, in that way, managed to escape from the jurisdiction of the court.

This case was decided prior to the General Statute of 1848 relating to extradition, and therefore the opinions have not been quoted at length as to the necessity of legislation in order to carry extradition treaties into effect. The opinions are interesting as showing the general law on the subject of extradition treaties before the passage of the statute, and many of the mooted points have been, since then, settled by statute.

tradition treaties already made or which may hereafter be made.[1]

§ 376. **Rights of individuals under treaty stipulations; Head Money Cases.**—In the *Head Money Cases* the Supreme Court sustained a *per capita* tax on immigrants, payable by the owner of the vessel bringing them, although it was contended that the act violated treaty stipulations as to the free ingress and egress of citizens. In his opinion Chief Justice FULLER says: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

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[1] For general extradition statutes see § 436, *post*.

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[1] *Edye* vs. *Robertson*, U. S. Cir. Ct.

"But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

"A treaty is made by the President and Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

"In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."

Other cases in which the effect of treaties on private rights are considered are referred to in the notes.[2]

S. D. N. Y. 1883, 21 Blatchf. 460, BLATCHFORD, J., affirmed U. S. Sup. Ct. 1884, 112 U. S. 580, MILLER, J. (*Head Money Cases.*)

[2] *The Pilot*, U. S. Dist. Ct. Wash. 1891, 48 Fed. Rep. 319, HARDFORD, J., reversed in U. S. Cir. Ct. App. 9 Cir. 1892, 7 U. S. App. 188, GILBERT, J.; also reported as *Dunsmuir* vs. *Bradshaw*, 7 *Id.* 193.

Respublica vs. *Gordon*, Sup. Ct. Penna. 1788, 1 Dallas, 252, McKEAN, J.

Town vs. *De Haven*, U. S. Cir. Ct. Oregon, 1878, 5 Sawyer, 146, DEADY, J., Fed. Cases, 14,113,

La Ninfa, The, U. S. Dist. Ct. Alaska, 1891, 49 Fed. Rep. 575, BUGBEE, J., and U. S. Cir. Ct. App. 9th Cir. 1896, 75 Fed. Rep. 513, HAWLEY, J.

In re Rodriguez, U. S. Dist. Ct. Texas, 1897, 81 Fed. Rep. 337, MAXEY, J.

United States vs. *Schooner Peggy*, U. S. Sup. Ct. 1801, 1 Cranch, 103, MARSHALL, Ch. J.

United States vs. *Diekelman*, U. S. Sup. Ct. 1875, 92 U. S. 520, WAITE, Ch. J., reversing *Diekelman* vs. *United States*, 8 Ct. Claims, 371, LORING, J., on appeal granted on application reported in 9 Ct. Claims, 320.

§ 377. **Chief Justice Marshall's rule in Foster vs. Neilson reiterated.**—The only conclusion that can be reached by an examination of all the reported decisions in regard to the necessity of legislative action to make treaties operative is the single sentence which has already been quoted from the opinion of Chief Justice Marshall in *Foster* vs. *Neilson*;[1] it is for the court to determine in each instance, in accordance with the subject-matter of the case at bar, and the terms of the treaty, whether or not the particular stipulation involved has become operative without legislative action or whether it requires such action; in view of the oft repeated notice of the Supreme Court that its decision on constitutional points must be confined to the exact state of facts as presented in the case decided, and cannot be inferentially extended, it is impossible to express an authoritative opinion as to the exact classes into which treaty stipulations can be divided in regard to the necessity of congressional action, except so far as they have been generally classified in the foregoing sections and illustrated by the cases above referred to in this chapter.

§ 378. **Treaties and statutes; the latest prevails; the Cherokee tobacco; Justice Swayne's opinion.**—As a general conclusion, however, it can be stated that although treaties and statutes have been held by the courts to be on the same plane as the supreme law of the land, and that while treaties can supersede prior acts of Congress; and acts of Congress can supersede prior treaties, as was held in a case

United States vs. *Rauscher*, U. S. Sup. Ct. 1886, 119 U. S. 407, MILLER, J.

Chae Chan Ping vs. *United States*, U. S. Sup. Ct. 1889, 130 U. S. 581, FIELD, J. See extract from opinion on p. 95, *post*.

Chew Heong vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 536, HARLAN, J. See extract from opinion on p. 94, *post*.

Fong Yue Ting vs. *United States*, U. S. Sup. Ct. 1893, 149 U. S. 698, GRAY, J., and see especially quotation on p. 103, *post*.

Canal Appraisers vs. *People*, N. Y. Court of Errors, 17 Wendell, 570, WALWORTH, Chanc. 1836.

Davis vs. *Police, Jury &c.* U. S. Sup. Ct. 1850, 9 Howard, 280, WAYNE, J., and see other cases collated under chap. XIII, *post*, involving private rights as affected by treaties of cession of, and transfer of sovereignty over territory.

§ 377.

[1] *Foster* vs. *Neilson*, U. S. Sup. Ct. 1829, 2 Peters, 253, MARSHALL, Ch. J. And see § 364, p. 66, *ante*.

decided by Mr. Justice Swayne in 1879,[1] it more often happens that the statute abrogates, and supersedes, the treaty,

§ 378.

[1] *The Cherokee Tobacco*, U. S. Sup. Ct. 1870, 11 Wallace, 616, SWAYNE, J.

Indians and freedmen residing in the Cherokee Nation were not subjected to the payment of taxes on any of their products sent to market, by the Cherokee treaty of 1866. The Internal Revenue Act of 1868 levied a tax upon spirits, liquors, tobacco, etc., "produced anywhere within the exterior boundaries of the United States."

The Indians claimed that notwithstanding this act they were exempt under the prior treaty, but the court held that the terms of the act included the Indian Reservations and that notwithstanding the treaty, the act would apply under the rule that an act of Congress supersedes a prior treaty. On pp. 620–622 the court says:

"But conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee nation because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together.

"The second section of the fourth article of the Constitution of the United States declares that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land.'

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

"Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles

than that the treaty abrogates, and supersedes, the statute; not because a statute is a higher order of law than a treaty but because the statute goes into effect without further congressional action, while the treaty may, and, in many instances, does, require such assistance.

This same principle applies in the tariff cases,[2] and also in the Chinese exclusion cases,[3] in fact there are many cases in which treaties have been superseded by conflicting statutes and in which the Supreme Court has decided that the later statute prevails as to the administration of law, and all questions of whether or not the faith of the nation is involved are referred to Congress, and to the Executive, as political matters and without the domain of the judiciary.[4]

only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?

The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked.

"We are glad to know that there is no ground for any imputation upon the integrity or good faith of the claimants who prosecuted this writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights." Messrs. Justices BRADLEY and DAVIS dissented.

[2] See § 371 pp. 68, *et seq.*, *ante*.

[3] See §§ 379–81, pp. 87, *et seq. post*.

[4] Besides the tariff cases referred to, see cases in which the *Cherokee Tobacco* has been cited, as follows:

United States v. *McBratney*, U. S. Sup. Ct. 1881, 104 U. S. 621, p. 623, GRAY, J.

Chew Heong vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 536, p. 565, HARLAN, J.

Head Money Cases, U. S. Sup. Ct. 1884, 112 U. S. 580, p. 597, MILLER, J.

Ward vs. *Race Horse*, U. S. Sup. Ct. 1896, 163 U. S. 504, p. 511, WHITE, J.

Draper vs. *United States*, U. S. Sup. Ct. 1896, 164 U. S. 240, p. 243, WHITE, J.

Thomas vs. *Gay*, U. S. Sup. Ct. 1898, 169 U. S. 264, p. 271, SHIRAS, J. And see also

Fong Yue Ting vs. *United States*, U. S. Sup. Ct. 1893, 149 U. S. 698, GRAY, J. See extract on p. 103, *post*.

Chinese Exclusion Cases, U. S. Sup. Ct. 1889, 130 U. S. 581, p. 600. See extract on p. 95, *post*.

La Abra Silver Mining Co. vs. *United States*, U. S. Sup. Ct. 1899, 175 U. S. 423, p. 460, HARLAN, J.

United States vs. *Mrs. Gue Lim*, U. S. Sup. Ct. 1900, 176 U. S. 459, p. 464, PECKHAM, J.

Whitney v. *Robertson*, U. S. Sup Ct. 1888, 124 U. S. 190, p. 194, FIELD, J.

§ 379. **Statutes which violate treaties; difference between State and United States statutes in this respect; the Chinese exclusion laws.**—No subject has created more controversy in regard to the relative effect of treaties and statutes than the Chinese Exclusion Acts, in regard to the immigration of certain classes of Chinese into the United States; this was the natural result in view of the manner in which those statutes conflicted with the provisions of the treaties between this country and China. It is impossible to summarize the treaties, statutes and decisions in a note to a section of this volume. To give the history of the statutes and the litigation which resulted therefrom and to summarize the decisions and the points decided would take a volume of several hundred pages; all that will be attempted, therefore, in the notes to this section will be to refer to the treaties,[1]

§ 379.
NOTES BY THE AUTHOR ON CHINESE EXCLUSION CASES.

[1] TREATIES WITH CHINA.

Since diplomatic relations were established with China eight treaties have been entered into with that nation as follows:

1. Treaty of Peace, Amity and Commerce, concluded July 3, 1844; ratified December 31, 1845; proclaimed April 18, 1846. United States Treaties and Conventions, edition of 1889, p. 145. That of Nov. 8, 1858 was negotiated as a substitute for this treaty. United States Treaties in Force, edition of 1899, p. 105.

2. Treaty of Amity, Peace and Commerce, concluded June 18, 1858; ratifications exchanged August 15, 1859; proclaimed January 26, 1860. United States Treaties and Conventions, edition of 1889, p. 159.

3. Convention for the Regulation of Trade, concluded November 8, 1858; ratifications exchanged August 15, 1859. United States Treaties and Conventions, edition of 1889, p. 169. United States Treaties in Force, edition of 1899, p. 105.

4. There was also a Convention concluded November 8, 1858, for the Adjustment and Payment of Claims. United States Treaties and Conventions, edition of 1889, p. 178. United States Treaties in Force, edition of 1899, p. 115.

5. Treaty of Trade, Consuls and Emigration, concluded July 28, 1868; ratifications exchanged November 23, 1869; proclaimed February 5, 1870. United States Treaties and Conventions, edition of 1889, p. 179. United States Treaties in Force, edition of 1899, p. 115.

While the treaties before this are still in force, according to compilation of treaties in force of 1899, and contain various clauses in regard to favored nations and intercourse, the stipulations relied upon in the

statutes[2] and principal decisions,[3] which are collated according to date and the principal points involved, as appears

Chinese cases were contained in this treaty of 1868. Art. V, VI and VII of this treaty are as follows:

"ARTICLE V. The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade or as permanent residents. The high contracting parties therefore join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country without their free and voluntary consent, respectively.

"ARTICLE VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

"ARTICLE VII. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China; and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside; and, reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States."

6. Immigration Treaty, concluded November 17, 1880; ratifications exchanged July 19, 1881; U. S. Treaties and Conventions, edition of 1889, page 182; U. S. Treaties in Force, edition of 1899, page 118. Articles I to IV of this treaty are as follows:

"ARTICLE I. Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality

[2] For note 2 see pp. 91, *et seq.*

[3] For note 3 see pp. 93, *et seq.*

by the subdivisions *3a–3k* of the notes. The anti-Chinese *State* legislation was discussed in the preceding chapter, in

within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.

"ARTICLE III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.

"ARTICLE IV. The high contracting Powers having agreed upon the foregoing articles, whenever the Government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the Government of China. If the measures as enacted are found to work hardship upon the subjects of China, the Chinese Minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States Minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result."

7. Treaty as to Commercial Intercourse and Judicial Procedure, concluded November 17, 1880; ratifications exchanged July 19, 1881; proclaimed October 5, 1881. U. S. Treaties and Conventions, edition of 1889, page 184. U. S. Treaties in Force, edition of 1899, page 120.

8. Convention for the Regulation of Chinese Immigration, concluded March 17, 1894; ratifications exchanged December 7, 1894. U. S. Statutes at Large, Volume 28, page 1210. U. S. Treaties in Force, edition of 1899, page 122. By Article I of this treaty it was agreed that for a period of ten years from December 7, 1894, the coming "except under the conditions hereinafter specified, of Chinese laborers to the United States, shall be absolutely prohibited."

which it was shown that the Federal Courts could, and would, step in and protect aliens, who were citizens of a government in treaty relations with the United States, from the slightest

ARTICLE II excepted the return to the United States of certain registered Chinese under certain conditions and on production of a certificate the form whereof was prescribed.

ARTICLE III provided that this should not affect the present right "of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein." (Subject however to the production of the prescribed certificate.)

ARTICLE IV provided that Chinese laborers and other classes permanently or temporarily residing in the United States should be protected as to property and person to the extent that such protection is given to citizens of the most favored nation except the right to become naturalized citizens, and in this respect ARTICLE III of the treaty of November 17, 1880, is reaffirmed.

ARTICLE V is as follows: "The government of the United States, having by an Act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named act to be registered as in said Acts provided, with a view of affording them better protection, the Chinese government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said Acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

"And the Government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this Convention, and annually, thereafter, it will furnish to the Government of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants."

This provision is probably unique,—the author is not aware of any other treaty in which a particular statute is described and practically incorporated into a treaty thus making it both statute and contract law; very interesting questions might arise under this peculiar combination should Congress be forced to pass any law conflicting with, or repealing, the statutes referred to in his treaty; fortunately the occasion has not arisen.

infraction of the rights guaranteed by the treaties through interference by State laws, or even by State Constitutions;

[2] CHINESE IMMIGRATION STATUTES.

The statutes relating to Chinese immigration, the enforcement of which resulted in the Chinese exclusion cases, were passed at various times from 1882 to 1891. The first act known as the "Geary" Law gave rise to great discussion in Congress and in the press throughout the country. The demand for the passage of these acts came from the Pacific slope where the inundation of Chinese had proved a cause of great trouble. The attempts of the States to suppress immigration had proved ineffectual as the courts decided that under the treaty stipulations, Chinese were protected and the States had no power to disregard those provisions. (See cases cited in §§ 336, *et seq.* of chapter XI, pp. 24, *et seq*, *ante.*) Finally, Congress yielded to the pressure brought to bear from the western States and enacted the exclusion laws.

The principal laws are as follows:

I. Chapter 126 of the First Session of the Forty-seventh Congress; an act to execute certain treaty stipulations relating to Chinese; approved May 6, 1882; 22 U. S. Stat. at L. p. 58. The preamble and first section of this act are as follows:

"Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore, *Be it enacted, etc.*, That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come after the expiration of said ninety days to remain within the United States."

Sections 2–15 of the statute contain various provisions for enforcing the law, exemptions, penalties for violations, and definitions of terms used.

II. Chapter 220 of the laws of the First Session of the Forty-eighth Congress; an act amending an act entitled, etc., approved May 6, 1882, approved July 5, 1884, 23 U. S. Stat. at L. p. 115.

By this act the entire act of 1882 was re-enacted, section by section, with certain modifications and amendments.

Chinese laborers who were in the United States on November 17, 1880, when the treaty of that date was concluded, were exempted from the provisions of both acts by special clauses to that effect.

Chapter 1015 of the laws of the First Session of the Fifty-first Congress; an act to prohibit the coming of Chinese laborers to the United States; approved September 13, 1888; 25 U. S. Stat. at L. p. 476. The first section of this act provided "that from and after the date of the exchange of ratifications of the pending treaty between the United States of America, and His Imperial Majesty the Emperor of China, signed on the 12th day of March Anno Domini, 1888, it shall be un-

and also that on numerous occasions State statutes, as well as provisions of State constitutions, were held null and void

lawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as hereinafter provided."

The two acts above referred to of 1882 and 1884, were by the 15th section of this act repealed, such repeal to take effect upon the exchange of ratification of the pending treaty referred to.

Section 2 of this act prevented "Chinese officials, teachers, students merchants, or travelers for pleasure or curiosity" to enter the United States except upon compliance with certain conditions and prescribed rules and regulations, specifically set forth in the statute.

It was provided by section 13, "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States Court, returnable before any United States Court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States such person shall be removed from the United States to the country whence he came." Then follow certain rules as to procedure, right of appeal, payment of expenses, and exemptions, diplomatic and consular affairs.

III. Chapter 1064 of the laws of the First Session of the Fifty-first Congress to supplement the act of May 6, 1882, approved October 1, 1888, 25 U. S. Stat. at L. p. 504.

By this act it was made "unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be a resident within the United States, and who shall have departed therefrom, and shall not have returned before the passage of this act, to return to, or to remain in, the United States."

IV. Chapter 60 of the laws of the First Session of the Fifty-second Congress; an act to prohibit the coming of Chinese persons into the United States, approved May 5, 1892, 27 U. S. Stat. at L. p. 25.

By this all laws in force prohibiting and regulating Chinese immigration were continued for ten years from the passage of the act.

According to the annotation of the statute on p. 25, this referred to the acts of May 6, 1882, July 5, 1884 and October 1, 1888. It does not appear that the Act of September 13, 1888, had gone into effect at that time.

This act made all the provisions as to immigration more stringent and provided for deportation as in the act of September 13, 1888. It placed the burden of proof therein in all cases upon the Chinese person seeking admittance or right to remain in this country, and also required all Chinamen in this country to register under certain conditions and penalties in case of noncompliance.

Chapter 14 of the laws of the First Session of the Fifty-third Congress, amending the act of May 5, 1892, approved November 3, 1893, 28 U. S. Stat. at L. p. 7.

because they attempted to contravene treaty rights which had been guaranteed by the United States. We find, how-

By this act the act of 1892 was amended, further provisions were made as to obtaining certificates of registry and for deporting Chinese persons illegally in the United States; the terms "laborers" and "merchants" were defined.

The two last mentioned acts were those referred to in the treaty of 1894, Art. V. (See p. 89, *ante*.)

The foregoing are the principal statutes which were enacted by Congress in regard to Chinese immigration. There were other statutes and provisions in the revenue, immigration and appropriation laws regarding this subject but the decisions of the Courts were based almost altogether upon the statutes quoted.

[3] CHINESE EXCLUSION CASES.

It can readily be seen that the statutes in some points differed from, or conflicted with, the treaty stipulations, and questions at once arose as to how far Chinese subjects were protected by the treaty stipulations, and as to the nature of their rights thereunder.

A few of the cases will be referred to at length; reference will be made to others. In all cases involving the construction of statutes, and treaties involving questions under the Chinese Exclusion Acts or statutes similar thereto, conflicting with treaty stipulations, the cases as well as the digests should be carefully examined and the different circumstances attendant upon each case carefully scrutinized.

The earliest decisions were made in the courts of the States of the Pacific slope. Mr. Justice FIELD of the Supreme Court sitting as Circuit Judge, and Judges HOFFMAN, SAWYER and DEADY of the United States Circuit and District Courts were at once called upon to decide, *first*, whether the exclusion law was constitutional on general principles; *second*, whether it was constitutional in view of the treaty stipulations, and *third*, how it should be construed and carried out as to the particular case before the court.

The laws were sustained on all points.

The decision made by Justice FIELD in 1883, in *In re Ah Lung*, 18 Fed. Rep. 28; *S. C.*, 9 Sawyer, 306, in the United States Circuit Court for California has been followed ever since. As the same justice afterwards wrote the opinion in the Chinese Exclusion Cases (130 U. S. 581; and see p. 95, *post*) an extract from his opinion will here be given:

"An act of congress, then, upon a subject within its legislative power is as binding upon the courts as a treaty on the same subject. Both are binding, except as the latter one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects requires. The courts cannot heed such complaint, nor refuse to give effect to a law of congress, however much it may seem to conflict with the stipulations of

ever, that although the statutes passed by Congress to prevent Chinese immigration were, in some respects, apparently

the treaty. Whether a treaty has been violated by our legislation, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply the case of conflicting laws, the last modifying or superseding the earlier."

At a later point reference will be made to other decisions in the United States District and Circuit Courts. The leading cases in the United States Supreme Court on the Chinese Exclusion laws are as follows:

3*a*. THE EARLIER SUPREME COURT CASES.

Chew Heong vs. *United States*, 1884, 112 U. S. 536, HARLAN, J.

Although this and the case of *Jung Ah Lung* (next cited) were the first cases involving the validity of these statutes to reach the Supreme Court neither of them was called the *First Chinese Exclusion Case*, that title being applied to the later case of *Chae Chan Ping*, 130 U. S. 581, FIELD, J. (See p. 553, *post.*)

The particular point involved was whether Chinamen resident within the United States at the time of the treaty of 1880, and who had departed before the act of 1882 went into effect had the right to return.

The points as decided are stated in the syllabus as follows:

"The fourth section of the act of Congress approved May 6, 1882, ch. 126, as amended by the act of July 5, 1884, ch. 120, prescribing the certificate which shall be produced by a Chinese laborer as the 'only evidence permissible to establish his right of re-entry' into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884.

"The rule reaffirmed that repeals of statutes by implication are not favored, and are never admitted where the former can stand with the new act.

"Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

In reaching this conclusion the justice writing the opinion cites at length from the treaty and from the act and takes the view that the repeals are not favored by implication and the act and treaty must be construed together if possible. (See § 387, *post.*)

United States v. *Jung Ah Lung*, 1888, 124 U. S. 621, BLATCHFORD, J.

In this case a Chinaman had not been allowed to land for want of a certificate provided in the exclusion acts.

It appeared that he resided in the United States on November 17, 1880, the date of the treaty with China; that he had left the United States temporarily after procuring the proper certificate provided by the act to allow him to return, but that he had lost the same, having

in direct violation of treaty stipulations, the Courts sustained them as constitutional, simply warning Congress that recla-

been robbed; that however, the books in the registration office in San Francisco proved his identity.

The court below had ordered his discharge—the United States appealed. The Supreme Court affirmed the discharge, and held that it was proper, under those circumstances, for the party to be produced on *habeas*, and that he was entitled to prove by proper evidence that he was authorized to land.

The government contended that the provisions of the treaty did not provide any judicial recognition of rights under a treaty, and that in the case of hardship it should be adjusted by diplomatic correspondence.

The Supreme Court held that that provision would not deprive the court of jurisdiction in the present case, and in that respect said (pp. 632, 633):

"It is also urged, that the statute confides to the collector of the port of San Francisco the authority to pass upon the question of allowing Jung Ah Lung to land in the United States, and provides no means of reviewing his action in the premises; that only executive action in enforcing the treaty and the statutes is contemplated, and that there is no case in law or equity, growing out of the facts, to be inquired into by a judicial tribunal.

"It is true that the 9th section of the act provides, that, before any Chinese passengers are landed from a vessel arriving in the United States from a foreign port, the collector of customs of the district in which the vessel arrives shall proceed to examine such passengers, comparing with the list and with the passengers the certificates issued under the act, and that no passenger shall be allowed to land in the United States from such vessel in violation of law. But we regard this as only a provision for specifying, and that no difference can be drawn from that or any other language in the acts that any judicial cognizance which would otherwise exist is intended to be interfered with.

"It is also urged that the treaty itself contemplates only executive action, for the reason that the fourth article of the treaty, 22 Stat. 827 provides that, if the legislation adopted by the United States to carry out the treaty shall be 'found to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him.' But there is nothing in this provision which excludes judicial cognizance, or which confines the remedy of a subject of China, in a given case of hardship, to diplomatic action."

HARLAN, FIELD and LAMAR, JJ., dissented.

3*b*. THE FIRST CHINESE EXCLUSION CASE.

Chae Chan Ping vs. *United States*, 1889, 130 U. S. 581, FIELD, J., affirming *In re Chae Chan Ping*, U. S. Cir. Ct. N. D. of Cal. 1888, 36 Fed. Rep. 431, SAWYER, J. In this case, which involved the acts of 1882,

mations might be made by the Chinese government for violations of the treaty, also stating, that such results and all that might follow were matters with which the Courts were not

1884 and 1888, and is generally known as the *First Chinese Exclusion Case*, a Chinese laborer had procured a certificate issued under the act of 1884, and he was refused permission to land on the ground that this certificate had been annulled by the act of 1888 during his absence.

The Circuit Judge sustained the collector and remanded the prisoner and held that the act of 1888 took effect from its passage—was a valid act; was not unconstitutional as an *ex post facto* act or divesting of vested rights, and that treaties and acts of Congress stand upon an equal footing as parts of the supreme law of the land and a later inconsistent provision in either repeals the earlier one in the other.

The case was appealed to the Supreme Court.

When the case reached the Supreme Court the statutes were attacked on every point including the power of the United States Government to exclude aliens. In affirming the Circuit Court Justice FIELD delivered an elaborate opinion sustaining the power of the Government which has already been quoted from at an earlier point in this volume (see § 317, p. 454, Vol. I).

The points decided are stated in the syllabus as follows:

"In their relations with foreign governments and their subjects or citizens, the United States are a nation, invested with the powers which belong to independent nations.

"So far as a treaty made by the United States with any foreign power can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or appeal *sic* (repeal). The *Head Money Cases*, 112 U. S. 580, and *Whitney* vs. *Robertson*, 124 U. S. 190, followed.

"The abrogation of a treaty like the repeal of a law, operates only on future transactions, leaving unaffected those executed under it previous to the abrogation.

"The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, and not such as are personal and untransferable in their character.

"The power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty, which cannot be surrendered by the treaty making-power.

"The act of October 1, 1888, 25 Stat. 504, c. 1064, excluding Chinese laborers from the United States, was a constitutional exercise of legislative power, and, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States.

"A certificate issued to a Chinese laborer under the fourth and fifth sections of the act of May 6, 1882, 22 Stat. 58, c. 126, as amended July 5, 1884, 23 Stat. 115, c. 220, conferred upon him no right to return to the

concerned, as they were wholly within the domain of Congress, which must assume all responsibility therefor.

United States of which he could not be deprived by a subsequent act of Congress.

"The history of Chinese immigration into the United States stated, together with a review of the treaties and legislation affecting it."

3c. THE NON-DESIRABLE ALIEN EXCLUSION CASE.

Ekiu, Nishimura vs. *United States*, 142 U. S. 651, U. S. Sup. Ct. 1891, GRAY, J.

This case does not involve treaty stipulations but simply the right under international law, municipal law and constitutional law of the United States to establish rules for immigration.

The act of March 3, 1891, 26 U. S. Stat. at L. p. 1084, which excludes certain classes of undesirable, diseased, criminal and pauper immigrants regardless of nationality from admission to the United States was sustained.

In speaking of the right of the United States to regulate immigration the court says (pages 659-660):

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.) c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. Constitution, art. 1, sec. 8; *Head Money Cases*, 112 U. S. 580; *Chae Chan Ping* vs. *United States*, 130 U. S. 581, 604-609.

"The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs and to inspectors acting under their authority. See, for instance, acts of March 3, 1875, c. 141, 18 Stat. 477; August 3, 1882, c. 376;

A partial list of *Chinese Exclusion* cases, deciding numerous minor or collateral questions arising from the conflict of

22 Stat. 214; February 23, 1887, c. 220, 24 Stat. 414; October 19, 1888, c. 1210; 25 Stat. 566; as well as the various acts for the exclusion of the Chinese.

"An alien immigrant, prevented from landing by an such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. *Chew Heong* vs. *United States*, 112 U. S. 536; *United States* vs. *Jung Ah Lung*, 124 U. S. 621; *Wan Shing* vs. *United States*, 140 U. S. 424; *Lau Ow Bew*, *Petitioner*, 141 U. S. 583. And Congress may, if it sees fit, as in the statutes in question in *United States* vs. *Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin* vs. *Mott*, 12 Wheat. 19, 31; *Philadelphia & Trenton Railroad* vs. *Stimpson*, 14 Pet. 448, 458; *Benson* vs. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray* vs. *Hoboken Co.*, 18 How. 272; *Hilton* vs. *Merritt*, 110 U. S. 97."

3*d*. THE CHINESE MERCHANT'S CASE.

In re Lau ow Bew, 1891, 141 U. S. 583, FULLER, Ch. J.

This case which was fully decided under the title of *Lau Ow Bew* vs. *United States*, 144 U. S. 47, (see p. 100, *post*) first came before the Supreme Court on an application for a writ of certiorari. The points involved were to some extent referred to in the opinion on granting the application.

The question before the court on the application is stated in the syllabus as follows:

"Only questions of gravity and importance should be certified to this court by the Circuit Court of Appeals, under the provisions of the act of March 3, 1891, c. 517, sec. 6.

"Whether the Chinese restriction acts in the light of the treaties between the United States and China, apply to a Chinese merchant, domiciled in the United States, who temporarily leaves the country for

statutes and treaties, will be found in the notes to this and the following sections; they are mostly decisions of the District

purposes of business or pleasure, *animo revertendi*, is such a question of gravity and importance.

"*Wan Shing* vs. *United States*, 140 U. S. 424, explained."

In discussing the question of whether or not the point should be certified, the opinion says (pp. 587–589):

"It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to the certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed, and determined as if brought here on appeal or writ of error.

"Assuming, for the purposes of the present motion, that the Court of Appeals had jurisdiction, it will be perceived from what has been stated that the disposition of the case involves the application of the Chinese restriction acts to Chinese merchants domiciled in the United States who temporarily leave the country for purposes of business or pleasure, *animo revertendi*, in the light of the treaties between the government of the United States and that of China.

"By the treaty between the United States and China of 1868, all Chinese subjects were guaranteed the right, without conditions or restrictions, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities and exemptions enjoyed by the citizens of the most favored nation. 16 Stat. 740, art. VI. The treaty of November 17, 1880, put no limitation upon this right, so far as Chinese other than laborers were concerned. 22 Stat. 826. To what extent was any limitation intended by the acts of 1882 and 1884, drawn into consideration here, bearing in mind the general rule that repeals by implication are not favored? The sixth section of the act of 1882, as amended by the act of 1884, 22 Stat. 58, 23 Stat. 115, provided that 'every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled,' and in the mode stated, and the certificate therein provided for is made the sole evidence, as to those to whom the section is applicable, to establish a right of entry into the United States. Manifestly, the question whether this section should be construed, taken with the treaties, to apply to Chinese merchants already domiciled in the United States, and to whom no intention of voluntarily surrendering that domicil can be imputed, is one of great gravity and importance.

"The status of domicil in respect of natives of one country domiciled in another is a matter of international concern, and the acts of Congress are to be considered, in view of general and settled principles upon that

and Circuit Courts of the United States for the Circuits including the States on the Pacific Slope, and of the Supreme Court

subject, in arriving at a conclusion as to the operation upon the treaties with China, designed by Congress in those enactments. Was it intended that commercial domicil should be forfeited by temporary absence at the domicil of origin, and to subject resident merchants to loss of rights guaranteed by treaty if they failed to produce from the domicil of origin that evidence which residence in the domicil of choice may have rendered it difficult, if not impossible, to obtain? We refrain from particular examination of the point involved, and refer to it only so far as necessary to indicate its importance.

"In the case of *Wan Shing* vs. *United States*, 140 U. S. 424, Wan Shing came to this country at the age of sixteen, remained two years, and then returned to China, where he passed seven years. Upon his own evidence he appeared to be not a merchant, but a laborer, and not to have gained a commercial domicil in this country; but if he had, his departure at the age of eighteen, and his absence for seven years, without any apparent intention of returning, brought him, in our judgment, within the category of those required to produce the certificate of identification of the government of his origin or of which he was the subject. Upon that state of facts, the precise inquiry arising on this petition did not present itself for definitive disposition, and we do not feel justified under the circumstances in declining to afford the opportunity for its full discussion, as now specifically pressed upon our attention.

"While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of opinion that the grounds of this application are sufficient to call for our interposition.

"Let the writ of certiorari issue as prayed."

Lau Ow Bew vs. *United States*, 144 U. S. 47, U. S. Sup. Ct. 1892, FULLER, Ch. J.

This was a Chinese exclusion case in which after the court had granted a writ of certiorari to issue as reported in *In re Lau Ow Bew*, 141 U. S. 583, it decided upon the merits as stated in the syllabus as follows:

"By section 6 of the act of March 3, 1891, establishing Circuit Courts of Appeals, 26 Stat. 828, c. 517, the appellate jurisdiction not vested in this court was vested in the court created by that act, and the entire jurisdiction was distributed.

"The words 'unless otherwise provided by law' in the clause in that section which provides that the Circuit Courts shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided for by law' were inserted in order to guard against implied repeals, and are not to be construed as referring to prior laws only.

"It is competent for this court by certiorari to direct any case to be certified by the Circuit Court of Appeals, whether its advice is requested or not, except those which may be brought here by appeal or writ of error.

"Section 6 of the Chinese Restriction Act of May 6, 1882, 22 Stat. 58,

on appeals from those Courts.[4] A summary of the cases and the points decided which was made by the late George S. Boutwell has been quoted as a note to this section.[5]

c. 126, as amended by the act of July 5, 1884, 23 Stat. 115, c. 220, does not apply to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes."

The first part of the opinion is devoted to the question of jurisdiction. The balance of the opinion (pp. 58 to 64), is a résumé of Chinese exclusion cases and interpretation of the various acts of congress and their construction. In discussing the statutes as to the exclusion of Chinese, the Court says (pp. 61–64):

"By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction upon the footing upon which such persons stand by reason of their domicil of choice, or commercial domicil, is to be presumed; while by our treaty with China, Chinese merchants domiciled in the United States, have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges and immunities enjoyed in this country by the citizens or subjects of the 'most favored nation.'

"There can be no doubt, as was said by Mr. Justice HARLAN, speaking for the court in *Chew Heong* vs. *United States*, 112 U. S. 536, 549, that, 'since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the Government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.'

"Tested by this rule it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants, having a commercial domicile here, from leaving the country for temporary purposes and then returning to and re-entering it, and yet such would be its effect, if construed as contended for on behalf of appellee.

"In the case of *Ah Ping*, 23 Fed. Rep. 329, 330, it was held that the section did not apply to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure; and the late Judge SAWYER delivering the opinion of the court said: 'As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand; hence the provision. As to those resident or domiciled in this country, we have ourselves the best means of identification; while as to many of them, even in their native country, and much less when they are temporarily in other foreign countries, there is no practicable means of either identifi-

For note 4 see pp. 114, *et seq.*
For note 5 see pp. 120, *et seq.*

§ 380. **Wide Scope of decisions in Chinese Exclusion Cases.**—It is difficult to make any complete summary of the

cation, or for procuring the certificate prescribed. The United States Statutes do not now, nor have they ever, required or provided for the issue of any certificate in this country to resident Chinese, other than laborers, either to China or other foreign countries. There are many Chinese merchants in California who have been domiciled in the State from 20 to 35 years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country, to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return."

"The question has been ruled in the same way by the Treasury Department on many occasions: by Secretary Folger, March 14, 1884, Syn. T. D. 1884, 128; by Secretary Gresham, September 25, 1884, id. 400; by Secretary McCulloch, January 14, 1887, id. 1887, 26; by Assistant Secretary French, December 2, 1884; by Assistant Secretary Maynard, November 7, 1888, and by Acting Secretary Batcheller, in the instructions of July 3, 1890, already given.

"No other rule in this respect was laid down by Congress in the act of September 13, 1888, 25 Stat. 476, c. 1015, nor in that of October 1, 1888, 25 Stat. 504, c. 1064, when the absolute exclusion of Chinese laborers was prescribed. *Chinese Exclusion Case*, 130 U. S. 581.

"We are of opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin, nor that resident merchants should be subjected to loss of rights guaranteed by treaty if they failed to produce from the domicil of origin that evidence which residence in the domicil of choice may have rendered it difficult if not impossible to obtain, and as we said in considering the application of this petitioner for the writ of certiorari, 141 U. S. 583, 588, we do not think that the decision of this court in *Wan Shing* vs. *United States*, 140 U. S. 424, ruled anything to the contrary of the conclusions herein expressed. As there pointed out, Wan Shing was not a merchant, but a laborer; he had acquired no commercial domicil in this country; and whatever domicil he had acquired, if any, he had forfeited by departure and absence for seven years with no apparent intention of returning. All the circumstances rendered it possible for him to procure and produce the specified certificate and required him to do so. We have no doubt of the correctness of the judgment then rendered and the reasons given in its support.

"As Lau Ow Bew is, in our opinion, unlawfully restrained of his liberty, we reverse the judgment of the Circuit Court of Appeals for the Ninth Circuit, and, as required by § 10 of the act of March 3, 1891, remand the cause to the Circuit Court of the United States for the Northern District of California, with directions to reverse its judgment and discharge the petitioner."

In the case of *Wan Shing* vs. *United States*, 1891, 140 U. S. 424, p. 428, FIELD, J., referred to in *Lau Ow Bew*.

Chinese Exclusion cases in a volume of this nature, owing to the wide scope of the decisions. In nearly every case many

Mr. Justice Field after briefly referring to the provisions of the statutes as to the necessity of Chinamen having certificates in order to enter the United States, said: "The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein, and have left with a view of returning; and that all other persons of that race except those connected with the diplomatic service must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséed by a representative of the government of the United States."

3c. THE SECOND CHINESE EXCLUSION CASE; DEPORTATION OF CHINAMEN.

Fong Yue Ting vs. *United States*, 149 U. S. 698, U. S. Supreme Ct. 1893, GRAY, J. *Wang Quan* vs. *United States* and *Lee Joe* vs. *United States* were argued and decided at the same time.

These are known as the *Second Chinese Exclusion Cases*, the first having been decided in 1889, and reported in 130 U. S. 581.

In this case the whole question of exclusion of aliens and treaty relations with China were under consideration. The Chinese exclusion act of 1892 is printed in the margin. The points decided are stated in the syllabus as follows:

"The right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation.

"In the United States, the power to exclude or expel aliens is vested in the political departments of the national government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department is authorized by treaty or by statute, or is required by the constitution, to intervene.

"The power of congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to remain in the country has been made by Congress to depend.

"Congress has the right to provide a system of registration and identification of any class of aliens within the country, and to take all proper means to carry out that system.

"The provisions of an act of Congress, passed in the exercise of its constitutional authority, must, if clear and explicit, be upheld by the courts, even in contravention of stipulations in an earlier treaty.

points of law were involved other than the relative effect of treaty stipulations and congressional statutes—the nature of

"Section 6 of the act of May 5, 1892, c. 60, requiring all Chinese laborers within the United States at the time of its passage, 'and who are entitled to remain in the United States,' to apply within a year to a collector of the internal revenue for a certificate of residence; and providing that any one who does not do so, or is afterwards found in the United States without such a certificate, 'shall be deemed and adjudged to be unlawfully in the United States, and may be arrested by any officer of the customs, or collector of internal revenue, or marshal, or deputy of either, and taken before a United States judge, who shall order him to be deported from the United States to his own country, unless he shall clearly establish to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause, he was unable to procure his certificate, and 'by at least one credible white witness' that he was a resident of the United States at the time of the passage of the act, is constitutional and valid."

A large part of the opinion of Mr. Justice GRAY, is devoted to the exposition of the sovereignty and nationality of the United States and the assertion that the "right to 'exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions in war or in peace' is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."

The opinion then states that this reduces the controversy before the court to the single question of whether the power inherent in the Government in this respect has been properly exercised and expressed in the Chinese exclusion cases according to the Constitution. The Court sustained the laws. The opinion is lengthy and only a few extracts can be given from pp. 713 *et seq.* Mr. Justice GRAY says:

"The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

"In *Nishimura Ekiu's case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

"The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

"The power of Congress, therefore, to expel, like the power to ex-

the government of the United States, the extent of the power of the Federal Government to regulate commerce and immi-

clude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

"Congress having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.

"It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

"For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the Treaty with Great Britain of 1794, in which the President's power in this regard was demonstrated in the masterly and conclusive arguments of John Marshall in the House of Representatives. 8 Stat. 129; Wharton's State Trials, 392; Bee, 286; 5 Wheat. appx. 3. But provision may be made, as it has been by later acts of Congress, for a preliminary examination before a judge or commissioner, and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Act of August 12, 1848, c. 167, 9 Stat. 302, Rev. Stat. §§ 5270-5274; *Ex parte Metzgar*, 5 How. 176; *Benson* vs. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330."

The opinion then discusses at length the Chinese treaties of 1868 and 1880 and the various decisions in regard to these treaties; and as to the effect of statutes and treaties, the court says (pp. 720–721):

"In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in *Chae Chan Ping's* case, following previous decisions: 'The treaties were of no greater legal obligation than the act of Congress. By the constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one or the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character,

gration, the interpretation of statutes, the rights of aliens regardless of treaty stipulations, the nature of citizenship of

requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.' 'So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.' 130 U. S. 600. See also *Foster* vs. *Neilson*, 2 Pet. 253, 314; *Edye* vs. *Robertson*, 112 U. S. 580, 597-599; *Whitney* vs. *Robertson*, 124 U. S. 190."

"Yet the court unanimously held that the statute of 1888 was constitutional, and that the collector in refusing his permission to land was unlawful; and, after the passages already quoted, said: 'The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of these sovereign powers delegated by the Constitution, the right to its exercise at any time when in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the object of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States, after their departure, is held at the will of the government, revocable at any time, at its pleasure.' 'The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character.' 'But far different is this case, where a continued suspension of the exercise of a government power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.' 130 U. S. 609, 610."

And the opinion concludes on p. 732, with the following decision:

"Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment

the United States, as well as many other points, are discussed and decided.

of the Circuit Court, dismissing the writ of *habeas corpus*, is right and must be affirmed." Mr. Justice BREWER dissented.

3f. OTHER POINTS INVOLVED.

The decision in the case of *Fong Yue Ting* vs. *United States* (*Second Chinese Exclusion Case*), 149 U. S. 698, GRAY, J., just above cited from was so emphatic and far-reaching that it forever settled the question that Congress can exclude and expel aliens of any nation and that it can do so practically without regard to treaty stipulations, leaving that element for adjustment by the Executive Department of the Government.

Other questions have, however, arisen in regard to the enforcement of the exclusion statutes and the Supreme Court has been called upon to construe them in regard to many of their details.

3g. DELEGATION OF AUTHORITY BY CONGRESS.

Lem Moon Sing vs. *United States*, 1895, 158 U. S. 538, HARLAN, J.

In this case the Supreme Court sustained the constitutionality of the act of 1894, declaring that the decision of the immigration or customs officers as to the right of Chinese to enter the United States is final unless reversed by the Secretary of the Treasury, and that the court cannot review it. The opinion says, on p. 547:

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to re-enter it? We think not. The words of the statute are broad, and include 'every case' of an *alien*, at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the government as expressed in enactments of the law-making power. He cannot, by reason of his domicil in the United States, for purposes of business, demand

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that his claim to re-enter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution."

It is well to note, however, the following qualification on p. 549:

"To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of *habeas corpus*, Lem Moon Sing was entitled, of right, under some law or treaty, to re-enter the United States. We mean only to decide that the question has been constitutionally committed by Congress to named officers of the executive department of the government for final determination."

3h. RIGHT OF JURY TRIAL.

Wong Wing vs. *United States*, 1896, 163 U. S. 228, SHIRAS, J.

In this case the Supreme Court held that aliens within the United States were entitled to the protection of the Fifth Amendment and that Chinese could not be imprisoned under the act of May 5, 1892, by a commissioner without trial by jury. On page 237 the opinion says:

"Our views upon the question thus specifically pressed upon our attention, may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

"But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

"No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislation should, after having defined an offense

erous cases cited in the notes to this and the preceding sections on this subject show that the important legal

as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

3*i*. THE CHINESE BABY CASE; CITIZENSHIP BY BIRTH.

United States vs. *Wong Kim Ark*, 169 U. S. 649, U. S. Sup. Ct. 1898, GRAY, J.

This case involved the citizenship of a Chinaman. It is sometimes referred to as the "Chinese Baby Case" as Wong Kim Ark claimed citizenship under the Fourteenth Amendment because he was born here, and that notwithstanding the fact of his parentage, he could not be deprived of his citizenship, even though his parents could not be naturalized. After a visit to China he was detained on his return to the United States under the exclusion statutes and had he not been a citizen he would have been excluded. The syllabus says (p. 649): "A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'"

FULLER, Ch. J., wrote a dissenting opinion in which HARLAN, J., concurred. The two opinions (about eighty pages in all), contain an exhaustive review of the law of citizenship in the United States especially as affected by the Fourteenth Amendment. All of the cases are reviewed, both American and English.

After referring to the general principles involved, the relations of China and this country and the effect of the exclusion, and other, acts affecting Chinese are discussed; the opinion closes as follows (699, 705):

"The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under these acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. *Chae Chan Ping* vs. *United States*, 130 U. S. 581; *Nishimura Ekiu* vs. *United States*, 142 U. S. 651; *Fong Yue Ting* vs. *United States*, 149 U. S. 698; *Lem Moon Sing* vs. *United States*, 158 U. S. 538; *Wong Wing* vs. *United States*, 163 U. S. 228.

"In *Fong Yue Ting* vs. *United States*, the right of the United States to

principles established by the decisions in regard to Chinese immigration, and the joint construction of treaty stipulations

expel such Chinese persons was placed upon the grounds, that the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare; that the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene; that the power to exclude and the power to expel aliens rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power; and, therefore, that the power of Congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. 149 U. S. 711, 713, 714.

"In *Lem Moon Sing* v. *United States*, the same principles were reaffirmed, and were applied to a Chinese person, born in China, who had acquired a commercial domicil in the United States, and who, having voluntarily left the country on a temporary visit to China, and with the intention of returning to and continuing his residence in this country, claimed the right under a statute or treaty to re-enter it; and the distinction between the right of an alien to the protection of the Constitution and laws of the United States, for his person and property while within the jurisdiction thereof, and his claim of right to re-enter the United States after a visit to his native land, was expressed by the court as follows: (quotes from this case paragraph which appears on p. 107, *ante*). . . .

"It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject—always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

"The power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress. *Chirac* v. *Chirac*, (1817) 2 Wheat. 259. For many years after the establishment of the original Constitution, and until two years after the adoption, of the Fourteenth Amendment, Congress never authorized the naturalization of any but 'free white persons.' Acts of March 36, 1790, c. 3, and January 29,

and congressional statutes, are that the United States, in its national capacity, and by virtue of its attributes of sover-

1795, c. 20; 1 Stat. 103, 414; April 14, 1802, c. 28, and March 26, 1804, c. 47; 2 Stat. 153, 292; March 22, 1816, c. 32; 3 Stat. 258; May 26, 1824, c. 186, and May 24, 1828, c. 116; 4 Stat. 69, 310. By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that 'nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.' 16 Stat. 740. By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were 'extended to aliens of African nativity and to persons of African descent.' 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should 'apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent;' and it was amended by the act of February 18, 1875, c. 80, by inserting the words above printed in brackets. Rev. Stat. (2d ed.) § 2169; 18 Stat. 318. Those statutes were held by the Circuit Court of the United States in California, not to embrace Chinese aliens. *In re Ah Yup*, (1878) 5 Sawyer, 155. And by the act of May 6, 1882, c. 166, § 14, it was expressly enacted that 'hereafter no state court or court of the United States shall admit Chinese to citizenship.' 22 Stat. 61.

"In *Fong Yue Ting* vs. *United States*, (1893) above cited, this court said: 'Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.' 149 U. S. 716.

"The convention between the United States and China of 1894 provided that 'Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nations, excepting the right to become naturalized citizens.' 28 Stat. 1211. And it has since been decided, by the same judge who held this appellee to be a citizen of the United States by virtue of his birth therein, that a native of China of the Mongolian race could not be admitted to citizenship under the naturalization laws. *In re Gee Hop*, (1895) 71 Fed. Rep. 274.

"The Fourteenth Amendment of the Constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,' contemplates two resources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States

eignty, has power to exclude aliens, or to deport them; that it can do so in whatever manner Congress shall determine,

can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised, either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice MARSHALL, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue.' *Osborn* vs. *United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents of children of a particular race, can affect citizenship, acquired as a birth right, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

"No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress be to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

"The fact, therefore, that acts of Congress, or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from operation of the broad and clear words of the Constitution: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

regardless of treaty stipulations; that if the statutes conflict with treaty stipulations, the law must be administered by

"Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, 'the right of expatriation is a natural and inherent right of all people,' and any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.' Rev. Stat. § 1999, reënacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months, when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and 'that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.'

"The evident intention, and the necessary effect of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative."

3*k*. THE CHINESE WIFE CASE.

United States vs. *Mrs. Gue Lim*, 1900, 176 U. S. 459, PECKHAM, J.

As stated in the syllabus: "Under the act of July 5, 1884, ch. 220, 23 U. S. Stat. at L. p. 115, construed in connection with the treaty with China of November 17, 1880, 22 Stat. 826, the wives and minor children of Chinese merchants domiciled in this country, may enter the United States without certificates." (See the opinion in this case, pp. 464–5, for a number of decisions in Chinese exclusion cases decided in lower courts).

In *Quock Ting* vs. *United States*, U. S. Sup. Ct. 1891, 140 U. S. 417, FIELD, J., a Chinese laborer was excluded on the facts.

government officials in accordance with the latest expression of Congress, leaving all questions as to the result of the vio-

[4] MISCELLANEOUS CASES IN UNITED STATES CIRCUIT AND DISTRICT COURTS.

The foregoing are the leading Supreme Court decisions. Many cases involving the Chinese Exclusion statutes and treaties have been decided by the Circuit and District Courts. It is impossible to cite all of them and many of them relate only to minor points of practice or procedure and are confined to the provisions of the statutes. Some of them are cited in this note and the reader is referred to the American Digest, Century Edition, vol. 2, columns 168–189, §§ 70–90, under the title ALIENS for a classified list of cases involving the construction of statutes and treaties affecting Chinese immigration prior to 1896, and to the annual supplements of the American Digest issued since 1896. Also to the Federal Reporter Digest of volumes 1–100 of that series recently issued.

The following cases are here cited for convenience of the reader although the Digests should be consulted.

The Chinese Cabin Waiter Cases, U. S. C. C. Cal. 1882, 13 Fed. Rep. 286, FIELD, J.

The Chinese Laborers' Case, U. S. C. C. Cal. 1882, 13 Fed. Rep. 291, FIELD and SAWYER, JJ.

The Chinese Merchant Case, U. S. C. C. Cal. 1882, 13 Fed. Rep. 605, FIELD and HOFFMAN, JJ.

The Chinese Exclusion Acts of 1882 and treaty stipulations were involved and construed as to various persons who had been detained and who had sued out writs of *habeas corpus;* they were allowed to enter.

In re Moncan alias Ah Wah, U. S. Cir. Ct. Ore. 1882, 8 Sawyer, 350, 14 Fed. Rep. 44, DEADY, J. This was a *habeas corpus* proceeding in which the collector had arrested certain Chinese seamen on American vessels in an American port under the Chinese Exclusion Act, claiming that they were unlawfully in the port. The interpretation of the Chinese Act of 1882 in regard to seamen was as follows: Chinese laborers on board of her as passengers or crew, are not unlawfully in the country, contrary to said act, during her stay and that the act does not apply to Chinese entering a United States port as such seamen with the intention of returning or proceeding to another foreign port in the ordinary course of commerce and navigation unless they leave the vessel while in the American port, or do not depart with her; held also, that a Chinese laborer who shipped on an American vessel at London prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the 90 days next following the passage of said act, is entitled to reside therein; this owing to the exterritoriality of an American vessel.

During the course of this opinion the court defines the words "voyage" and "touch" as used in regard to commerce.

In re Pong Ah Chee, U. S. D. Ct. Col. 1883, 18 Fed. Rep. 527, HOFFMAN, J. In this case a Chinaman detained under the exclusion act of 1882

lations of treaties to be settled by the Executive and Political Departments of the Government; that if treaty stipulations

sought to be released on *habeas*. The application was denied as the act expressly excepts from its term Chinese in the United States on November 17, 1880, the date of the treaty, who produce the certificate required by the statute, and the court held in regard thereto that his failure to produce same would not be excused.

United States vs. *Douglass*, U. S. Cir. Ct. Mass. 1883, 17 Fed. Rep. 634, NELSON, J. In an action under the Chinese Exclusion Act against the master of a British bark for bringing a Chinese laborer into Boston, the defense was that the Chinaman was born in Hong Kong, and had always been a British subject.

In re Chin Ah On, U. S. Dist. Ct. Dist. of Cal. 1883, 9 Sawyer, 343, HOFFMAN, Dist. J. Some Chinese laborers who had left China before the law of 1882 went into effect were detained because they were not provided with the certificates required by the act. The judge discharged them on the ground that the act only applied to those leaving the United States and returning from China *after* the law went into effect. The ground on which this decision is based is that Art. II of the treaty of 1880 and the statute are in conflict, and in the absence of the clearest proof the Court will not presume that Congress intended to violate a treaty stipulation. In this respect after quoting from the treaty, the opinion says (p. 345):

"For it will not be disputed that the right to 'come and go of their own free will and accord' is practically denied when a condition is annexed to its exercise impossible of performance.

"It is very clear, therefore, that in the provisions under consideration congress referred to Chinese laborers who might leave the United States and to Chinese persons who might leave China after the law went into effect, and not to Chinese laborers who might leave this country before that period. The case of such laborers was not provided for, and it was probably overlooked.

"I am persuaded not only that this construction of the act of Congress is required by the general rules which govern the interpretation of apparently conflicting enactments, but that to hold otherwise would be to attribute to the legislative branch of this government a want of good faith and a disregard of solemn national engagements which, unless upon grounds which leave the court no alternative, it would be indecent to impute to it.

"I may add that the same conclusion was reached by Mr. French, the assistant secretary of the treasury, and communicated to the collector in a very clear and convincing instruction under date of October 20, 1882."

In re Ho King, U. S. Dist. Ct. Ore. 1883, 14 Fed. Rep. 724, DEADY, J. A Chinese actor detained under the exclusion law of 1882 on *habeas corpus* proceedings was allowed to enter, the district judge deciding that the term "laborer" was used in the treaty with China of 1880 and the act of May in 1882, in its popular sense, and did not include

and statutes can be so construed as to give consistent and reasonable effect to both, the court will construe them to-

any person but those whose occupation involved physical toil and who worked for wages, and that the petitioner did not come within the purview of such treaty or law and should be allowed to enter under the treaty of 1880.

In re Leong Yick Dew, U. S. Cir. Ct. Cal. 1884, 10 Sawyer, 38, SAWYER, J. This was a *habeas corpus* proceeding under the Chinese exclusion law of 1882 on behalf of Chinese who had not been able to procure certificate.

The court held that Chinese laborers who were in the United States on November 17, 1880, the date of the treaty with China, and who left before the passage of the restriction act, on May 6, 1882, and those who came into the United States and departed therefrom between such dates, or afterward before June 6, 1882, the date on which the collector of the port of San Francisco was prepared to issue the certificates provided for in section 4, of such act, in the form prescribed by the secretary of the treasury, are entitled to re-enter the United States upon satisfactory evidence of their former residence other than that furnished by such certificate.

The court also held that this did not apply to any Chinese laborers who were residents of the United States on November 17, 1880, and who left the United States after the restriction act took effect and who having had an opportunity to obtain a certificate had not done so.

The court also held that the act of 1882 took effect upon its approval by the President.

In re Look Tin Sing, U. S. Cir. Ct. Cal. 1884, 10 Sawyer, 353, FIELD, J. This was prior to the *In re Wong Kim Ark case*, 169 U. S. 649, decided by the Supreme Court. A similar decision was made that the Chinese exclusion acts of 1882 and 1884 are not applicable to citizens of the United States although of Chinese parentage, and that no citizen can be excluded from the United States except in punishment of crime.

In re Ah Kee, U. S. Dist. Ct. S. D. N. Y. 1884, 22 Blatchf. 520, BROWN, D. J. *Held*, that a Chinaman born at Hong Kong after cession to Great Britain was a Chinaman within the meaning of the statute of 1882. See also *In re Ah Lung*, U. S. Cir. Ct. Cal. 1883, 18 Fed. Rep. 28, 9 Sawyer, 306, FIELD, J.

In re Ah Quan, U. S. Cir. Ct. Cal. 1884, 10 Sawyer, 222, SAWYER, J. Rules laid down in this case to govern the court in passing upon the right of the Chinese to enter the United States in view of the exclusion acts of 1882 and 1884.

In re Ah Ping, U. S. Cir. Ct. Cal. 1885, 23 Fed. Rep. 329, SAWYER, J. *Held*, that the exclusion acts of 1882 and 1884 did not apply to a Chinese merchant who had been doing business in San Francisco and had returned to China prior to the act, but that he had a right to return to this country, citing *Chew Hong* vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 536, HARLAN, J., as follows:

"To these [reasons] may be added the further one that courts uni-

gether, and that only where the two are absolutely irreconcilable will the court presume that Congress intended to vio-

formly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature."

In re Thomas Baldwin, U. S. Cir. Ct. Cal. 1886, 11 Sawyer, 533, SAWYER and SABIN, JJ. (Affirmed *sub nomine Baldwin* vs. *Franks*, U. S. Sup. Ct. 1887, 120 U. S. 678, WAITE, Ch. J.)

The two Judges at the Circuit Court differing, the matter was certified to the Supreme Court and decided in favor of petitioner; it was a *habeas* proceeding and the question was whether or not Congress had provided for the punishment of persons depriving Chinese subjects of immunities and rights guaranteed to them by the treaty of 1880. Sections 5519, 5508 and 5336 U. S. Rev. Stat. in regard to conspiracies within states were involved. It was held that section 5519 is unconstitutional as a provision for the punishment of a conspiracy within a State to deprive an alien of rights guaranteed to him thereunder by treaty, but as to conspiring was not decided.

In re Chung Toy Ho, U. S. Dist. Ct. Ore. 1890, 14 Sawyer, 531, DEADY, J. It was held in this case that Chinese wives and children of Chinamen here could not be excluded under the exclusion acts:

"It ought not to be lightly or without cogent reason concluded, that Congress, in the passage of the act of 1884, professedly 'to execute' the treaty of 1880, really intended to limit or restrain its operation in this respect. The treaty (art. 2) declares that a Chinese merchant may bring his 'body and household servants' with him into the country, and they 'shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations.'

"It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned as entitled to such admission is found in the fact that the domicil of the wife and children is that of the husband and father; and that the concessions to the merchant of the right to enter the United States and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

"My conclusion is, that under the treaty and statute taken together, a Chinese merchant, who is entitled to come into and dwell in the United States, is thereby entitled to bring with him and have with him, his wife and children. The company of the one and the care and custody of the other are his by natural right, and he ought not to be deprived of either, unless the intention of Congress to do so is clear and unmistakable."

late treaty stipulations with foreign powers. There are more than a hundred cases involving the construction of stipula-

The Chinese women detained were discharged and permitted to enter the port.

In re Panzara, U. S. D. C. E. D. N. Y. 1892. 51 Fed. Rep. 275, BENEDICT, J. This is not a Chinese case but related to an Italian excluded under the alien immigration law. On proof that he had resided here *held* that an alien domiciled within the United States although not naturalized was not an "alien immigrant" within the meaning of the statute and the petitioner was allowed to enter.

Lem Hing Dun vs. *United States*, U. S. Cir. Ct. App. 9 Cir. 1892, 7 U. S. App. 31, HANDFORD, J. (See also *Gee Fook Sing* v. *United States*, 7 U. S. App. 27.) On appeal from *Chinese Exclusion cases* the Circuit Court of Appeals will not reverse upon questions of fact alone.

United States vs. *Ah Fawn*, U. S. Dist. Ct. Cal. 1893, 57 Fed. Rep. 591, ROSS, J. *Held* that the words of exclusion in the treaty of 1880 and statutes (Gray Law, 1880) were sufficient to exclude "highbinders" and gamblers.

United States vs. *Yong Yew*, U. S. Dist. Ct. Missouri, 1897, 83 Fed. Rep. 832, ADAMS, J. This was a proceeding by the government to obtain an order for the deportation of Yong Yew on the grounds that he was unlawfully in the country under the various exclusion acts.

He claimed that he was not included in the term Chinese laborer.

The court referred at length to the various laws in regard to exclusion and deportation of Chinese from the United States and of the provisions of the treaties of 1881 and 1894, and also the proclamations putting it into effect.

In that respect the opinion says (pp. 835–836):

"To illustrate and emphasize the general policy of the laws of the United States, reference may be appropriately made to the recent treaty between the United States and China promulgated December 8, 1894. Article 1 provides that for a period of 10 years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified (which are immaterial for the purpose of this case), of Chinese laborers to the United States, shall be absolutely prohibited. Section 5 of this treaty recites the legislation of congress of the United States found in the acts of May 5, 1892, and November 3, 1893, already referred to, and contains an agreement on the part of the Chinese government to their strict enforcement.

"From the foregoing provisions of law, it is manifest that, under the sanction and with the approval of the Chinese government, the United States has devised and put into operation an internal policy to effectually prevent the immigration of Chinese laborers into this country, and to effectually prevent Chinese laborers from remaining in this country in the event they improperly or unlawfully come here.

"Concurrent history, of which the court takes judicial cognizance, teaches that the mischief sought to be remedied by this legislation was

tions in our treaties with China, and of statutes, apparently and actually in conflict therewith, in regard to the prohibition

to prevent the demoralizing effect upon American laborers of competition with Chinese laborers, and also to prevent the demoralizing effect of Oriental civilization, habits, customs, and morals upon the people of this country. In construing such legislation, it is clear that I must have constantly in mind the mischief sought to be remedied, and the object sought to be accomplished. A résumé of the legislation already detailed at some length, so far as applicable to the case under inquiry, is as follows: That for a period extending at least 10 years after the 7th day of December, 1894, the date of the exchange of ratifications of the last-mentioned treaty by the two governments of the United States and China, no Chinese laborer is permitted to come into this country, or, if perchance he may so come, to remain within the territorial limits of the United States. This prohibition is limited to laborers. A Chinese 'merchant,' if he be such within the definition of that term as found in the act of November 3, 1893, *supra*, is permitted to come into this country and remain here; and a certificate of identity, containing among other things, the nature, character, and estimated value of the business carried on by him, is made *prima facie* evidence of his right to enter the territory of the United States as a merchant. The method of enforcing this legislation is a trial before a justice, judge, or commissioner of the United States, and, upon an adjudication that any Chinese person is not lawfully entitled to be or remain in the United States, a removal of such person from the United States to the country from whence he came.

"Respondent claims that, within the meaning of the treaties and laws aforesaid, he was a merchant in China at the time of his departure for the United States, and has produced the certificate of identity already referred to, and claims it to be his protection."

The court held that he was not a merchant but really was a laborer. And there also in this case was a question whether or not he was properly identified as being the person named in the certificate.

The court sustained the application for an order of deportation.

In re Tom Yum, U. S. Dist. Ct. Cal. 1894, 64 Fed. Rep. 485, MORROW, J. *Held*, that although the act of 1894 made the decision of the Emigration Commission final as to the exclusion of Chinese, that wherever a man claimed his right to enter on the ground of citizenship, he could not be deprived of the right to have his citizenship determined by the courts, and that a writ of *habeas corpus* was the proper remedy; no treaty rights were involved in this case, as the petitioner claimed on the ground of citizenship.

Lew Jim vs. *United States*, U. S. Cir. Ct. App. 9 Cir. 1895, 29 U. S. App. 513, MCKENNA, J. *Held*, on the facts, that a Chinaman was not a merchant within the meaning of the act of 1893.

See also as to the mining statutes and the rights of Chinese to locate claims.

Chapman vs. *Toy Long*, U. S. Cir. Ct. Ore. 1876, 4 Sawyer, 28, DEADY, J.

and regulation of Chinese immigration. Many of them are referred to in the notes to this, and the preceding sections;

Section 2319 of U. S. Rev. Stat. confines the right to purchase mines on United States lands to United States citizens and those who have declared their intention to become such, Chinamen not being allowed to be naturalized in the United States. *Held*, that they have no right to locate and purchase mines and the defendants were enjoined from locating mining claims. The court, however, on page 36 raised some question as to whether or not the statute was not a violation of treaty.

[5]MR. BOUTWELL'S VIEWS AND SUMMARY.

"By the second and third articles of a treaty between the United States and the Emperor of China, concluded November 17, 1880, it was agreed in substance that the Chinese subjects of certain specified classes who were then in the United States, should be 'allowed to go and come of their own free will and accord, and be accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation.'

"Sec. 404. There was also a further stipulation that if laborers of any other class than those enumerated, then residing in the territory of the United States, should 'meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens and subjects of the most favored nation, to which they are entitled by treaty.'

"Sec. 405. The Court held that these stipulations did not act of their own vigor, as parts of the treaty, and that in their nature they could not be observed and enforced by the Court unless Congress provided by law for their execution.

"Sec. 406. Attention was called to three sections of the Revised Statutes (5336, 5508 and 5519). The Court found that those sections did not relate to aliens, and that of course they were inapplicable to Sing Lee and others, his associates, who were Chinese aliens. The word 'citizen' as used in the statutes cited, was limited to citizens of the United States, and of the respective States as defined and guaranteed by the fourteenth amendment of the Constitution of the United States.

"Sec. 407. The Court recognized the authority of Congress to pass laws by which alien Chinese of the class referred to in the treaty would have been protected against interference, but as Congress had neglected to act in the premises, the Court was unable to furnish the protection contemplated by the treaty.

"Sec. 408. Other questions were raised in the case known as 'The Chinese Exclusion Case' (130 U. S. 581). Subsequent to the decision in the case of Baldwin against Franks, Congress passed an act by which Chinese laborers were excluded from the United States. It was contended at the bar that inasmuch as the act of exclusion was contrary to

in some cases extracts have been given from the decisions; the investigation of any new case, however, which may arise

the terms of the treaty, the law was therefore unconstitutional. The Court held, however, that the laws of the United States, and treaties were alike the supreme law of the land, but that in all cases the last expression of the sovereign will must control. Mr. Justice Field, in the opinion which he gave, cited the act of Congress of July 7, 1798, by which the stipulations of the treaties theretofore concluded with France were abrogated.

"Sec. 409. From these two cases, these propositions of Constitutional law may be deduced:—

"1. Where the provisions of a treaty secure specific rights to individuals, those rights can be enforced by the Courts without the aid of the Legislative branch of the government.

"2. Where a treaty contains a declaration that immunities and privileges shall be secured to aliens, the means of securing such privileges and immunities must be provided by the Legislative branch of the government, or otherwise the Courts are powerless to act in the premises.

"3. That the power of the Legislative Department to exclude aliens, for example, from the United States is an incident of sovereignty which cannot be surrendered by the treaty-making power.

"4. That the Legislative Department of the government may annul a treaty by a legislative act.

"Sec. 410. Several cases of importance have been considered and adjudged by the Supreme Court which had their origin in the legislation of Congress designed first, to limit the migration of Chinese into the United States, and then, secondly, to secure the deportation of those persons of Chinese origin and birth who might not comply with the requirements of a statute enacted in 1892, and entitled, 'An act to prohibit the coming of Chinese into the United States.' 27 Stat. at L. 25.

"The important cases are these, viz.:—

"*Chy Lung* vs. *Freeman*, 92 U. S. 275.

"*Chew Heong* vs. *The United States*, 112 U. S. 536.

"*Yick Wo* vs. *Hopkins*, 118 U. S. 356.

"*United States* vs. *Jung Ah Lung*, 124 U. S. 621.

"*Chae Chan Ping* vs. *The United States*, 130 U. S. 581.

"*Nishimura Ekiu* vs. *The United States*, 142 U. S. 651.

"*Fong Yue Ting* vs. *The United States*, 149 U. S. 698.

"The views of the court are so fully set forth in the opinion rendered in the case last named that a critical examination of the preceding cases is unnecessary.

"In the case of *Chy Lung*, the court held that a law of California which exacted a bond or commutation in money as a condition precedent to the landing of classes of persons enumerated, among which was a class termed 'lewd and debauched women,' was in derogation of the power of Congress to regulate commerce with foreign nations.

"The case of *Yick Wo* is treated under the fourteenth amendment.

"Sec. 411. The main point considered in the case of Chae Chan Ping

under the existing treaties and statutes or those that may be hereafter concluded and enacted necessarily involves an

was the power of Congress to abrogate a treaty. The existence of the power was recognized and affirmed.

"In the case of *Nishimura*, the Court, held that the statute of March 3, 1891, which forbade the landing of certain classes of immigrant passengers, was constitutional and valid.

"The opinion in the case of Fong Yue Ting, from the pen of Mr. Justice Gray, is a review of the preceding cases in which the powers of Congress have been considered by the Supreme Court.

"The decisions rendered in those cases seem to be final as to the existence of the powers following, viz.:—

"1. Congress has power to abrogate a treaty. The treaty-making power is vested in the President and the Senate, and with the consent of the other contracting party it is competent for the President and Senate to annul an existing treaty; but the power to abrogate a treaty is vested in Congress alone.

"2. Congress has power to exclude aliens from the territory of the United States, and the exercise of that power may be vested in executive officers. Aliens, not residents, are not 'persons' in the language of the Constitution, therefore the phrase 'due process of law' is not applicable to them.

"'It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'

"Sec. 412. The Statute of 1892 gave rise to a question of more importance, viz.: Can the Congress of the United States declare by statute that aliens who are upon the territory in conformity to existing laws may be sent from the country as is provided in that statute? By that statute, all Chinese laborers who were in the country at the time of the passage of the act were required to obtain a certificate of that fact from the collector of internal revenue, and in default of such certificate at the end of a year from the passage of the act, the delinquent was to be taken before a judge of a United States Court, and in default of the ability to explain, as required in the Statute, his failure to procure the certificate, it is made the duty of the judge to decree the deportation of the laborer.

"On this point the Court said: 'The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the Judicial Department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.' . . .

"'The power to exclude aliens and the power to expel them rest upon

examination of all of the cases cited in the notes, or which may hereafter be decided, as the decisions vary according to the peculiar circumstances involved in the cases under consideration.

§ 382. **Termination of war by treaty of peace.**—There are, as we have seen,[1] many ways in which the action of both houses of Congress can nullify the treaty-making power of the Executive and two thirds of the Senate. There is one remarkable instance, however, in which the treaty-making power can override congressional action, although fortunately, the power seldom has to be exercised in this manner. War can only be declared by Congress, a majority vote of both houses being necessary for a formal declaration of war;[2] true, hostilities commenced either by

one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.'

"Under this power the Court said that it was competent for Congress to direct that any Chinese laborer found in the United States without a certificate of residence might be removed out of the country by executive officers without judicial trial or examination, as it might have authorized such officers to have prevented his entrance into the country.

"This statement was not required by the issues raised on the statute, and upon the important question whether under that statute the removal contemplated was by due process of law, the Court said: 'When, in the form prescribed by law the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power, for here are all the elements of a civil case,—a complainant, a defendant and a judge,—*actor, reus et judex.*'

"Thus, the power of Congress to provide for the exclusion of aliens from the territory of the United States, and to provide for the deportation of such as may be within the jurisdiction of the United States, is an unlimited power.

"A treaty is the supreme law of the land, which the Courts are bound to take notice of and to enforce, in any appropriate proceeding, the rights of parties growing out of the treaty. (United States v. Rauscher, 119 U. S., 407.)" Chapter XXXIV, sections 409–412, pp. 292–296, Boutwell's Constitution of the United States.

§ 382.

[1] See §§ 364, *et seq.*, pp. 66, *et seq.*, *ante*, and §§ 384–387, pp. 129, *et seq. post.*

[2] "Congress shall have power . . .

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to

a foreign government or by insurgents may cause a state of war to exist which, without any legislative action will permit the Executive to call out the armed forces of the United States to protect national territory and interests.[3] If, however, war is declared, Congress must declare it. If armies are to be raised and paid Congress must appropriate the money for that purpose.[4] After war has been declared peace negotiations can be instituted, and a treaty of peace concluded, by the Executive, and, when the same shall have been ratified by two thirds of the Senate, the condition of war terminates upon the exchange of the ratifications without further action by Congress. Legislation may be necessary to carry out stipulations in the treaty as to payments of money and other contractual relations assumed, but no legislation is necessary to transform the condition of war, established by the declaration of Congress, into the condition of peace established by the treaty.[5]

Apart from Indian treaties of peace, there have been three occasions on which wars declared by Congress have been terminated by treaties made by the Executive and ratified by two thirds of the Senate,—with England in 1814,[6] with

that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval forces;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" Const. U. S., Art. I, § 8, cls. 11–15.

"The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Const. U. S., Art. II, § 2, cl. 1.

"He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators Present concur." *Idem*, Art. II, § 2, cl. 2.

[3] *Talbot* vs. *Janson*, U. S. Sup. Ct. 1795, 3 Dallas, 133, RUTLEDGE, Ch. J. See also the *Prize Cases*, U. S. Sup. Ct. 1862, 2 Black, 635, GRIER, J.

[4] See constitutional provisions under note 2 of this section.

[5] *Downes* vs. *Bidwell* (*Insular Case*), U. S. Sup. Ct. 1901, 182 U. S. 244, BROWN, J.; see INSULAR CASES APPENDIX at end of volume I.

[6] The actual hostilities of the war of 1812 with Great Britain were commenced prior to the declaration that a condition of war existed which was passed by Congress June 18, 1812 (2 U. S. Stat. at L. 755); the war was terminated by the Treaty of Ghent, concluded December 24, 1814, ratified by the

Mexico in 1848,[7] with Spain in 1898.[8] The war of the Revolution was terminated prior to the adoption of the Constitution.[9] There were no formal declarations of war with France in 1800, and neither the strained relations with that country at that time[10] or the war of the Rebellion of 1861–

Senate February 16, 1815; ratifications exchanged February 17, 1815; proclaimed February 18, 1815. U. S. Treaties and Conventions (edition 1889), p. 399; U. S. Treaties in Force, 1899, p. 206.

[7] The fact that war with Mexico existed was evidenced by two statutes declaring the same, passed May 13, 1846, 9 U. S. Stat. at L. 9, and June 13, 1846, *Idem*, p. 17. The war was terminated by the Treaty of Guadaloupe-Hildago concluded February 2, 1848, ratified by Senate, with amendments which were accepted by Mexico, March 10, 1848; ratifications exchanged May 30, 1848; proclaimed July 4, 1848. U. S. Treaties and Conventions (edition 1889), p. 681; U. S. Treaties in Force, 1899, p. 391.

[8] War with Spain was declared by an Act of Congress passed April 25, 1898, as follows: CHAP. 189.—An Act Declaring that War exists between the United States of America and the Kingdom of Spain.

Be it enacted, &c.; "First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"Second. That the President of the United States be, and he hereby is directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this Act into effect." Approved April 25, 1898.

The war was terminated by a treaty of peace concluded at Paris, Dec. 10, 1898, ratified by the Senate Feb. 6, 1899; ratifications exchanged and treaty proclaimed April 11, 1899. U. S. Treaties in Force 1899, p. 595, 30 U. S. Stat. at L. p. 1754.

This treaty was concluded by a peace commission appointed by the President pursuant to a protocal signed at Washington August 12, 1898, by the then Secretary of State William R. Day, and Jules Cambon the French Ambassador to the United States on behalf of Spain. See TREATIES APPENDIX at end of this volume for treaty and protocol.

[9] The Provisional Articles (1782) and Definitive Treaty of Peace (1783) with Great Britain terminating the War of the Revolution were prior to the Constitution.

[10] There was no declaration of war against France in 1800, although a condition of war existed as was subsequently held by the Supreme Court in *Bas* vs. *Tingy*, U. S. Sup. Ct. 1800, 4 Dallas, 37, MOORE, WASHINGTON, PATERSON, JJ., the treaties were abrogated by Act of Congress February 20, 1800 (2 U. S. Stat. at L. p. 7).

For numerous instances in which hostilities have preceded declarations of war, see Hostilities without Declaration of War; an historical abstract of the cases in which hostilities have occurred between

1865[11] were terminated by treaties; in one case friendly relations were resumed and in the other the insurrection was quelled. It is impossible to refer to all the authorities on this subject, the works of writers on international law should be consulted as well as the leading cases which are collated in the various digests.[12]

civilized powers prior to declaration or warning, from 1700 to 1870. Compiled in the Intelligence Branch of the Quartermaster-General's Department by Brevet-Lieutenant Colonel J. F. Maurice, Royal Artillery, London, 1883.

[11] The Civil War was terminated without any treaty, as the so-called Confederate States never had any standing which justified negotiations therewith; while the rebellion assumed enormous proportions and in many respects necessitated the employment of methods of regular warfare between independent nations, as to the political relations between the States in rebellion and the central government it was merely an insurrection, and as such was terminated by cessation of hostilities and proclamations of amnesty and not by treaty. See the *Prize Cases*, U. S. Sup. Ct. 1862, 2 Black, 635, GRIER, J.

The status of the so-called Confederate States of America was determined by the Supreme Court in *Williams* vs. *Bruffy*, U. S. Sup. Ct. 1877, 96 U. S. 176, FIELD, J.

The following is stated in the syllabus:

"1. The Confederate States was an illegal organization, within the provision of the Constitution of the United States prohibiting any treaty, alliance or confederation of one State with another; whatever efficacy, therefore, its enactments possessed in any State entering into that organization must be attributed to the sanction given to them by that State. . . .

"7. *De facto* governments defined: 1. As to successful revolutions expelling a regularly constituted government. 2. As to attempt on the part of a country to establish a separate government. . . .

"8. The Confederate government was distinguished from each kind of such *de facto* governments. Whatever *de facto* character may be ascribed to it consists solely in the fact that for nearly four years it maintained a contest with the United States, and exercised dominion over a large extent of territory. Whilst it existed, it was simply the military representative of the insurrection against the authority of the United States; when its military forces were overthrown, it utterly perished, and with it all its enactments.

"9. The legislative acts of the several States stand on different grounds; and, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, they are, in general, to be treated as valid and binding."

[12] See Abbott's National Digest under WAR for a very complete list of authorities on the various cases decided by the Federal Courts and which involved legal questions as to congressional and executive action in civil and foreign wars.

§ 383. **When treaties take effect, as to governments and as to individuals.**—It is proper at this point to make some reference in regard to the time when treaties take effect both as to the contracting governments and as to individuals who are affected thereby.

The rule in this respect can be broadly stated to the effect that a treaty takes effect when the ratifications are exchanged, but that as to the contracting governments the treaty relations are supposed to date back to the date when the plenipotentiaries concluded it. The basis for this rule seems to be that as a treaty is a contract, it is not complete until it has actually been exchanged, or delivered by both parties, and that the delivery itself is not complete until the highest powers have ratified the act of the Commissioners and the formalities of delivery have been complied with. It has, therefore, been held that private rights are not affected by a treaty until the delivery has actually taken place, as individuals are not entitled to rely on the provisions of a treaty until every formality has been complied with, and the treaty actually proclaimed by the Executive as a law.

As to the contracting governments, however, the rule appears to be different, and the relations are to be considered as established on the basis of the treaty from the time that the treaty is concluded; this is, of course, subject to the possibility of non-ratification, but the ratification when completed is to be considered as having a retroactive effect and dating back to the day of the conclusion of the treaty by the plenipotentiaries. One of the leading cases on this subject involved the question of inheritance under a treaty with Switzerland in which a period of nearly five years intervened between the conclusion of the treaty and the exchange of the ratifications.[1]

§ 383.

[1] *Haver* vs. *Yaker*, U. S. Sup. Ct. 1869, 9 Wallace, 32, DAVIS, J., also reported as *Jecker* vs. *Magee*.

The treaty with Switzerland was concluded and signed in 1850, but it was not ratified until 1855.

Under the laws of Kentucky in force in 1853, aliens could not inherit but this disability was removed by the treaty. Yaker died in Kentucky in 1853 pending the ratification of the treaty; the Kentucky court, where the Swiss heirs set up this treaty as a basis of their title, held that it took effect only when ratified and therefore decided against their claim. On ap-

There are some instances, however, in which the question may arise as to whether rights under a treaty are in their nature governmental or individual. The author is not prepared to admit that in cases of cession of territory the exchange of ratifications can be delayed after the constitutional powers of both governments have actually ratified the treaty,

peal this was affirmed; the opinion says (pp. 34-35):

"It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's* case, reported in 6th Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

Hylton vs. *Brown*, U. S. Cir. Ct. Penna. 1806, 1 Wash. 343, WASHINGTON, J.: fixing exact date when treaty of 1783 with Great Britain took effect.

In re Metzgar, U. S. Dist. Ct. S. D. N. Y. 1847, Fed. Cas. 9511, BETTS, J.

United States vs. *Reynes*, U. S. Sup. Ct. 1850, 9 How. 127, DANIEL, J., *held* that "the treaty of St. Ildefonso between Spain and the French Republic, and that of Paris, between France and the United States, should be construed as binding on the parties thereto, from the respective dates of those treaties."

Davis vs. *Police Jury*, *etc.*, U. S. Sup. Ct. 1850, 9 How. 280, WAYNE, J.

Doe (or Clark) vs. *Braden*, U. S. Sup. Ct. 1853, 16 How. 635, TANEY, CH. J.

Ex parte Ortiz, U. S. Cir. Ct. Minn. 1900, 100 Fed. Rep. 955, LOCHREN, J.

See Glenn on Int. Law, § 107, p. 149.

See Rule II for construction of treaties; U. S. Treaties and Con., Ed. 1889, p. 1227. See Davis' Rules in note 6, § 391, p. 145, *post*.

and that meanwhile individual rights are either suspended or actually negatived by this delay.[2]

This subject is within the domain of a treatise on the construction of treaties rather than that of a book of this nature; a few cases bearing on this point are referred to in the notes to this section, but the leading authorities on international law should be consulted.

§ 384. **Abrogation of treaties, various methods.**—In the cases cited which have involved treaty stipulations and Federal Statutes, treaties have either been, or have not been, carried into effect by subsequent legislation of Congress; or statutes subsequently passed in conflict with treaties have been held to be constitutional, and to have superseded or modified the treaty, although in many instances clearly in violation of the stipulations therein contained. There are other instances, however, in which the Court has held that the treaty is not superseded or modified, but is entirely abrogated and ceases to bind either nation or the citizens and inhabitants thereof. Treaties, which expressly so provide, may expire by limitation of time, determined by the treaty itself; they may also be abrogated, so far as the United States is concerned, by Congressional action in several different methods.[1]

First: Either by a formal resolution or act of both Houses

[2] In the *Insular Cases* the Supreme court has cited *Haver* vs. *Yaker* as authority for limiting the right of recovery of duties exacted on goods brought into Porto Rico to those brought in after the *exchange of ratifications* on April 11, 1899, although the treaty had been *ratified* by the governments of both nations long prior thereto and the formal exchange was delayed until the Spanish ambassador arrived in the country. See argument of Ex-Secretary John G. Carlisle on this point in the Insular Cases Record, pp. 821, *et seq.*

Dooley, Smith & Co. vs. *United States*, No. 1. U. S. Sup. Ct. 1901. (*Insular Cases*) 182 U. S. 222. BROWN, J. And see extract from opinion, § 61*f*, p. 124, Vol. I.

See also cases on this point collated in INSULAR CASES APPENDIX at end of volume I.

§ 384.

[1] In this connection only the municipal, or internal law, of the United States is under consideration, the abrogation of a treaty by some of the methods referred to in this section might be made the basis of reclamations by the other contracting government, and lead to international complications more or less serious in their nature. But although the abrogation might be a breach of contract for which, before an international tribunal,

of Congress approved by the President, or, in case of his refusal to approve it, passed over his veto by two thirds of both Houses, in which case it becomes the latest expression of the Legislative department of the Government, and, therefore, the supreme law of the land, and the Executive department is bound to carry out the wishes of the Legislature in express terms.[2]

Second: By legislation, not abrogating the treaty in terms, but terminating the relations existing thereunder, or rendering them impossible of continuance, by enacting legislation hostile thereto, or conflicting therewith, and which may supersede the treaty as to the special stipulations affected, or in effect abrogate it altogether.[3]

Third: By legislation, which, while it does not directly, in terms, abrogate the treaty, either in whole or in part, or by direct words suspend the operation of any of the provisions, so conflicts therewith that the doctrine of repeal by implication applies thereto as it would to statutory provisions similarly affected; it having been held by the Supreme Court that when a statute cannot be rationally construed without repealing conflicting clauses of a previously existing treaty, the treaty must fall and the statute must remain as the latest expression of the legislative will.[4]

Fourth: By a declaration of war in which case treaties with the hostile power are either by force of the declaration suspended during the war or abrogated altogether.[5]

The instances given in the foot notes hereto, in which

the United States would be adjudged to have acted improperly, the power exists to abrogate the treaty and to conduct the affairs of this country on the basis of the abrogation and the courts of the United States would be bound to uphold the acts of the Legislative department of the Government in this respect.

[2] See statutes in 1798 and resolutions in 1883 abrogating treaties with France and Great Britain, respectively referred to in notes 1 and 2 to the next section.

[3] The Chinese exclusion laws are the best illustration of conflicting statutes of this class. See note 2 to § 379, pp. 91 *et seq.*, *ante*.

[4] See *Ward* vs. *Race Horse*, referred to in § 386 for illustration of this method.

[5] The extent to which treaties are suspended or abrogated by war is discussed by nearly every writer on international law and many divergent views have been expressed in regard thereto. There are certain treaties which cannot be suspended or abrogated by war; some, be-

these various methods of abrogating treaties in whole or in part have been adopted, are only a few instances but they illustrate the practical application of each rule.[6]

The effect of the abrogation of a treaty on private rights created or affected by the treaty is a matter of judicial determination.[7]

§ 385. **Direct abrogation by Congressional action.**—Congress has on more than one occasion exerted its legislative

cause they provide for a permanent condition of affairs, as, for instance, cession of territory; others, because they provide for a condition of affairs during war, as, for instance, our treaty with Italy of 1871 provides for the treatment of private property on the sea during war. On the other hand all provisions for extradition, treatment of litigants in court, and others involving the exercise of friendly relations must necessarily be suspended; the better opinion now seems to be that commercial treaties must be revived after war. A controversy arose after the war of 1812 as to whether or not the treaties existing prior thereto between this country and Great Britain were or were not abrogated, especially as to fishery rights of this country off the coasts of the British North American possessions. Great Britain (Lord Aberdeen) took the position they were; we contended they were not. The question was never satisfactorily settled, but the new treaty of 1815 superseded the older treaties as to commercial relations and some of the fishery questions were settled by the treaty of 1818. The right of Great Britain to navigate the Mississippi under the treaty of 1783 has never been recognized since the war of 1812 by the United States.

In the compilation of Treaties in Force, edition of 1899, the statement is made (p. 592) that: "The treaties with Spain were annulled by the war of 1898."

See Wharton's Digest, Int. Law, vol. 2, § 137*a*, pp. 58, *et seq.*

[6] See the notes on abrogation of Treaties in Appendix to Treaties and Conventions of the United States, edition of 1889.

For other instances of abrogation see also the views of the Supreme Court on abrogation of treaties and the effect thereof as expressed in the *Chinese Exclusion cases*, and quoted in notes to § 379, p. 96, and p. 105, *ante*.

[7] Continuing personal rights would undoubtedly cease and if the abrogation were improper a citizen of the unoffending nation would have a claim against the abrogating government but it could only be enforced diplomatically; vested property rights can, however, be protected by the courts after the termination of a treaty.

Society, etc., vs. *New Haven*, U. S. Sup. Ct. 1823, 8 Wheaton, 464, WASHINGTON, J., *held* that the termination of a treaty does not divest rights of property already vested under it.

Chirac vs. *Chirac*, U. S. Sup. Ct. 1817, 2 Wheaton, 259, MARSHALL, CH. J., *held* that State statutes enacted in consequence of a treaty

power to abrogate treaties and terminate the relations established thereby. Several instances are given in the notes to this section;[1] one of the earliest cases being in 1800 when the treaties with France were abrogated on account of the unfriendly treatment of our merchant vessels by that power. In 1883, after the payment of the Halifax award, already referred to in this chapter, Congress by resolution directed the abrogation of those clauses of the treaty of Washington of 1871 with Great Britain, which related to fisheries and exportation and importation of fish products. In this case there was an undoubted right to abrogate the treaties as no permanent relations or vested interests were involved or affected. The national right to abrogate treaties containing provisions intended to be permanent is discussed under a subsequent section.[2]

§ 386. **Abrogation by implication; Ward vs. Race Horse.** —The Supreme Court in *Ward* vs. *Race Horse*[1] held that the

are not repealed by its abrogation.

§ 385.

[1] The then existing treaties with France were abrogated by act of Congress passed July 7, 1798, which was as follows:

"CHAP. LXVII. *An act to declare the treaties heretofore concluded with France no longer obligatory upon the United States.*" The act recites the improper conduct of France, and declares that: "The United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States." 1 U. S. Stat. at L. 578.

The nature of the hostilities between France and the United States is discussed in *Bas* vs. *Tingy*, U. S. Sup. Ct. 1800, 4 Dallas, 37.

Articles 18–25 and Article 30 of the treaty of Washington with Great Britain of 1871 were abrogated pursuant to provisions in the treaty by joint resolution of both houses of Congress, March 31, 1883, (22 U. S. Stat. at L. 641,) the abrogation to take effect on July 1, 1885, the treaty requiring two years' notice, and the resolution providing for such notice. The notice was given by the President by a proclamation, on January 31, 1885, (23 U. S. Stat. at L. p. 841,) declaring that those articles would cease to have any effect after July 1, 1885.

[2] See § 388, p. 135, *post*, see also note 6, p. 131, *ante*.

§ 386.

[1] *Ward* vs. *Race Horse*, U. S. Sup. Ct. 1896, 163 U. S. 504, WHITE, J.

This case involved provisions in the treaty of 1869 with the Bannock Indians as to their right to hunt in the reservation. *Held*, as stated in the syllabus, that, "the provision in the treaty of February 24, 1869,

abrogation of a treaty by implication resulted from an act of Congress which conflicted therewith. The case has already been referred to as an authority on the point that a treaty stipulation is superior to State laws; in the Supreme Court that point was not affected, but the decision was reversed on the ground that a treaty with the Bannock Indians which gave them certain hunting privileges in the great forests of Wyoming was absolutely abrogated, as to all those clauses, by the statute which admitted Wyoming as a State and gave it certain controlling power over the same forests.

In considering this case we must bear in mind that, although it was made with an Indian tribe, the rule that the relative effect of treaties and statutes is to be determined in the same manner as treaties with foreign powers applies, and that the doctrine laid down in this case will be applicable to treaties with foreign powers under that general doctrine so far as the administration of our municipal law is concerned.

Justice White in this case declared that the right to hunt given by the treaty contemplated the eventual disappearance of the conditions specified in the treaty and also under a reservation in the treaty, left the matter subject to the will of the United States, and provided that the right to

with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that 'they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon,' etc., does not give them the right to exercise this privilege within the limits of that State in violation of its laws."

This opinion, which reversed the decision of the Circuit Court reported in 70 Fed. Rep. 598, *sub nomine In re Race Horse*, was based on the ground that the admission of Wyoming as a State practically meant an abrogation of the treaty.

In that respect the court says (p. 514), after reviewing a number of cases:

"Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the State of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconciliable in the sense that the two under no reasonable hypothesis can be construed as coexisting."

The opinion cites many cases on the subject of repeal by implication, several of them to the effect that it is not favored.

hunt should cease when the United States parted with the title to the land; under this clause he held that no restraint was imposed by the treaty on the power of the United States to sell, and that neither meaning would necessarily imply a violation of the faith of the government if Congress should forbid the killing of game in any of the reserved forests. The point was not raised, however, because the United States had disposed of the land, but because, as the opinion says, it had "called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders," and therefore the case, by *implication*, came under the same rule as the Cherokee Tobacco[2] and the Chinese Exclusion cases;[3] that "a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty," with the effect that if the law creating the State was in conflict with the prior treaty it may supersede it. It must always be remembered, that, as has already been stated, these decisions relate to the law as it must be administered within the United States, and do not in any wise affect the international claims which may arise by reason of the enactment of statutes which violate, and thereby practically abrogate, treaties either in whole or in part.[4]

§ 387. **Repeals and abrogations by implication not favored.**—The opinion in *Ward* vs. *Race Horse*, declares that the settled rule of law undoubtedly is that repeals by implication are not favored and will not be accepted if any other reasonable construction can be placed on the statute. "But," the opinion continues, "in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by which

Mr. Justice Brown wrote a dissenting opinion.

The Chinese Exclusion Cases, cited under § 379 and notes thereto, p. 93, *et seq.*, *ante*, bear more or less upon this point also.

[2] The *Cherokee Tobacco*, U. S. Sup. Ct. 1870, 11 Wall. 616, SWAYNE, J., and see § 378, p. 84, *ante*.

[3] The *Chinese Exclusion Cases*. Examine cases cited in § 379 and notes thereto, pp. 93, *et seq.*, *ante*.

[4] See § 384, p. 129, *ante*.

both laws can coexist consistently with the intention of Congress." After citing several cases the conclusion of the court is stated as follows:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservations whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority (the opinion then reviews a large number of decisions).[1] Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the States of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as co-existing."

§ 388. **Right of Abrogation in general.**—In the foregoing sections the abrogation of treaties has been treated exclusively from the standpoint of the municipal law of the United States, and the effect of abrogation either by direct action of the proper department of the Government of the United States or by implication owing to congressional action conflicting with the treaty. So far as Federal or State Courts of the United States are concerned, no question can be raised as to the right of abrogation of any treaty, or of any part of any treaty. The rule so often referred to in preceding sections—that the later statute supersedes the prior treaty—applies, and the courts will not question the right of Congress to act in such manner as it shall see fit in regard to our treaty relations, leaving the international complications that

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[1] See 163 U. S., pp. 511-514.

may result from such action to be settled by diplomatic action, or by the subsequent action of Congress.

The right of one nation to abrogate a treaty with another nation when that treaty contains provisions intended to be perpetual is not properly within the scope of the subject-matter of this volume. If the United States abrogated any existing treaty in a regular manner, the courts would consider it as abrogated and adjudicate questions in cases coming before them thereafter accordingly. In fact, if the treaty contained any provisions which the other contracting party has not carried out, the courts will not consider that the treaty rights of that party have been affected by such failure unless, and until, the Executive or Legislative department of the Government shall have declared that the treaty has been violated.[1]

If, however, the other power objects to the abrogation and claims either that the treaty has been violated, or that it cannot be abrogated at all, the question is not one for our State or Federal Courts but one that must be settled by the rules of international law, either diplomatically, or, if that fails, by arbitration, or even by war if all peaceful methods fail.

Many writers have expressed their views on this subject; it would be impossible to collate them all. Nor can any rigid rule be laid down. The right of any nation to arbitrarily and without the consent of the other nation to abrogate any treaty (which does not contain any time limit or method of abrogation) must depend upon the nature of the stipulations, the circumstances under which the treaty was made, and those under which one party seeks to abrogate it and the other to sustain it.[2] National faith and honor may be involved; on

§ 388.

[1] *Jones* vs. *Walker*, U. S. Cir. Ct. Va. 1803, 2 Paine, 688, s. c., Fed. Cas. No. 7507, JAY, Ch. J. *Held* that the courts have no power to declare a treaty void on account of alleged violations by the other government so long as the proper department of this government considers the treaty in force and acts accordingly. See other cases cited in notes to § 460, *post*.

[2] In this respect Wheaton says, Boyd's third edition, London, 1889 (§ 29, 29*a*, p. 44): "The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States, which may have induced them to enter into certain engagements. Whether the treaty be termed real or personal, it will continue so long as

the other hand national life and existence may also be at stake; the question of possibly sacrificing the former, as it may have been pledged in former times under then existing circumstances, in order to save the latter at the present time, is certainly a political question which must be settled by the proper department of the Government to which the safety of the nation is committed and one with which the courts cannot, and will not, interfere.

these relations exist. The moment they cease to exist, by means of a change in the social organization of one of the contracting parties, of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen this change, the treaty ceases to be obligatory upon him." Then follows a list of treaties which the United States considers as abrogated owing to changed relations.

In Hall's International Law this subject is treated on pages 364 *et seq.* A notable instance of the withdrawal of a power from treaty obligations is cited on page 369. Russia was a party to the Treaty of Paris of 1856, by which the maintenance of a fleet on the Black Sea was forbidden. In 1870 the Russian Government during the Franco-Prussian war issued a circular declaring that it was no longer bound by that part of the Treaty of 1856 which related to the Black Sea. On page 372 Hall states in regard to this: "The protest of Lord Granville, although uttered under circumstances which made its practical importance at the moment very slight, nevertheless compelled Russia to abandon the position which it had taken up. A conference was held of such of the Powers, signatory of the Treaty of Paris, as could attend, at which it was declared that 'it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.' The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice. The force of its assertion may have been impaired by the fact that Russia, as the reward of submission to law, was given what she had affected to take. But the concessions made were dictated by political considerations with which international law has nothing to do. It is enough that from the legal point of view that the declaration purported to affirm a principle as existing, and that it was ultimately signed by all the leading powers of Europe." Citing as a reference to the treaty Hertslet's Map of Europe by Treaty, 1256–7, 1892–8, 1904.

The United States was not a party to this declaration.

For a list of cases in which the courts have declined to interfere with the Executive and Legislative Departments of Government in regard to construction of, and action

§ 389. **These views applied to the Clayton-Bulwer treaty.** —This question may come before the people of the United States at any time in regard to the Clayton-Bulwer treaty of 1850 with Great Britain.[1] By this treaty this country and Great Britain are apparently pledged to a joint ownership and control of any trans-Isthmian canal connecting the Atlantic and Pacific Oceans. The treaty contains no provision for its abrogation. It was entered into under peculiar circumstances, at a time when the condition of this country was very different from what it is today, and the events which were anticipated in 1850, in view of which the treaty was made, have never transpired. It was undoubtedly a mistake on the part of the Executive to make the treaty and of the Senate to ratify it.[2] The question of its abrogation, how-

under, treaties, see § 460, *post*, and cases collated in INSULAR CASES APPENDIX at end of Volume I.

§ 389.

[1] Convention as to ship canal connecting Atlantic and Pacific Ocean, concluded at Washington April 19, 1850: U. S. Tr. and Con., ed. 1889, p. 440; U. S. Treaties in Force, ed. 1899, p. 234. For details see TREATIES APPENDIX, p. 446, *post*. See also Hay-Pauncefote treaty abrogating Clayton-Bulwer treaty concluded November 18, 1901, and now (December, 1901) pending before the Senate of the United States for ratification; (included in full in TREATIES APPENDIX, p. 454, *post*).

[2] In speaking of this treaty, ex-Secretary of State, John W. Foster, says (pp. 456–8, A Century of American Diplomacy, 1901): "Mr. Clayton, then Secretary of State, entered into negotiations with the British minister, the result of which was the treaty by which the two governments stipulated for a joint guarantee of the canal to be constructed; and agreed not to occupy, fortify, colonize or assume or exercise any dominion over any part of Central America. The treaty was ratified without much discussion, in the belief that it would insure at once the construction of the canal and would exclude British colonization and protectorates from Central America; but it was no sooner published than it began to be a source of dispute as to its scope and meaning. Secretary Blaine, in 1881, described it as 'misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious.' President Buchanan said in 1857, that if in the United States the treaty had been considered susceptible of the construction put upon it by Great Britain, it never would have been negotiated, nor would it have received the approbation of the Senate. Mr. Cass, who was a member of the Senate at the time it was ratified, has made a similar declaration.

"The American expectation as to the early construction of the Canal, with the aid of British capital, was disappointed; and for the next ten years our secretaries of

ever, is one which involves consideration of all of the elements enumerated in the preceding section. To the author it seems as though it is purely a political act wholly within the domain of Congress; that if the Executive cannot obtain the abrogation or proper modification of the treaty through friendly diplomacy, that Congress must eventually determine the question; and if, in the best judgment of the Legislative department of the Government, the present and future safety of the country demands the abrogation of that treaty, Congress has not only the legal power but also the moral right to abrogate it, and the judicial department of the Government could not, and would not interfere to prevent it.

It is impossible to give a complete list of publications in which the Clayton-Bulwer treaty is referred to; nearly every writer on international law and Trans-Isthmian Canal subjects has referred to it, in one way or another, and many diverse views have been expressed in regard to the moral right, as well as to the advisability, of abrogating it.[3]

§ 390. **Congressional legislation to carry out treaty stipulations; Justice Field's opinion in the Ross case.**—This can hardly be treated as a separate subject. The legislation necessary to carry out treaty stipulations is within the do-

state were occupied in bringing the British government to an observance of its engagements respecting colonization and protectorates. The treaty marks the most serious mistake in our diplomatic history, and is the single instance, since its announcement in 1823, of a tacit disavowal or disregard of the Monroe Doctrine, by the admission of Great Britain to an equal participation in the protection and control of a great American enterprise. The wisdom of that doctrine is most signally illustrated in the effects of this single disavowal, the heated discussion engendered, and the embarrassments which the treaty has brought to this Government, and from which it still suffers." For a somewhat different view see Rhode's History of United States since 1850, chap. III, vol. 1.

[3] For some of the authorities, and for correspondence, on this subject, see Wharton's Digest, Int. Law, vol. II, § 150, p. 184, *et seq.* See also, Correspondence in relation to the Proposed Interoceanic Canal between the Atlantic and Pacific Oceans, The Clayton-Bulwer Treaty and the Monroe Doctrine; being a reprint of Senate Executive Documents No. 112, 46th Congress, 2d Session; No. 194, 47th Congress, 1st Session; and No. 26, 48th Congress, 1st Session. Washington, Government Printing Office, 1885. See also Lindley Miller Keasbey's Nicaragua Canal and the Monroe Doctrine, G. P. Putnam's Sons, New York and London, 1896.

main of Congress to the same extent as the making of the treaty is within the domain of the Executive department and two thirds of the Senate; the Constitution expressly confers upon Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[1] That this applies to treaties properly made, is apparent from the fact that the words "to enforce treaties" which were in the original draft were stricken out as superfluous.[2]

There are but few cases on this subject but they fully sustain the rule that the power to legislate in regard to treaty stipulations is co-extensive with the power to enter into and ratify the treaty; and that if the treaty is properly within the domain of the treaty-making power and legislation is required to make it effectual, ample power in Congress exists to enforce the provisions of the treaty by proper legislation.[3] The leading case on this question, which was decided by the Supreme Court in 1891,[4] Justice Field delivering the opinion,

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[1] U. S. Const., Art. 1, § 8, cl. 18.

[2] See § 186, p. 318, volume I.

[3] See author's opinion in regard to fisheries in the Great Lakes and power to enforce treaty stipulations as to preservation thereof by legislation, with outstanding State ownership of waters and fish § 445, *post.*

[4] *In re Ross*, U. S. Sup. Ct. 1891, 140 U. S. 453, FIELD, J.

This case involved the right of the United States to establish consular courts in foreign countries under and by virtue of treaty stipulations.

The petitioner had been sentenced to death, which sentence had been subsequently commuted to imprisonment for life by the judgment of a consular court in Japan. On *habeas corpus* proceedings the Federal court sustained the power of the Extra Territorial court. The syllabus is as follows:

"By the constitution of the United States a government is ordained and established 'for the United States of America,' and not for countries outside of their limits; and that Constitution can have no operation in another country.

"The laws passed by congress to carry into effect the provisions of the treaties granting exterritorial rights in Japan, China, etc., (Rev. Stat. secs. 4083–4096), do no violation to the provisions of the Constitution of the United States, although they do not require an indictment by a grand jury to be found before the accused can be called upon to answer for the crime of murder committed in those countries, or secure to him a jury on his trial.

involved the validity of a sentence of death rendered by a consular court in Japan established pursuant to treaty, and

"The provision in Rev. Stat. sec. 4086, that the jurisdiction conferred upon ministers and consuls of the United States in Japan, China, etc., by secs. 4083, 4084 and 4085, shall be exercised and enforced in conformity with the laws of the United States gives to the accused an opportunity of examining the complaint against him, or of having a copy of it, the right to be confronted with the witnesses against him, and to cross-examine them, and to have the benefit of counsel, and secures regular and fair trials to Americans committing offences there, but it does not require a previous presentment or indictment by a grand jury, and does not give the right to a petit jury.

"The jurisdiction given to domestic tribunals of the United States over offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of a consular tribunal in Japan, China, etc., to try for a similar offence, committed in a port of the country in which the tribunal is established, when the offender is not taken to the United States.

"Article IV of the treaty of June 17, 1857, with Japan is still in force, notwithstanding the provisions in Article XII of the treaty of July 29, 1858.

"When a foreigner enters the mercantile marine of a nation, and becomes one of the crew of a merchant vessel bearing its flag, he assumes a temporary allegiance to the flag, and, in return for the protection afforded him, becomes subject to the laws by which that nation governs its vessels and seamen.

"A law or treaty should be construed so as to give effect to the object designed, and to that end all its provisions must be examined in the light of surrounding circumstances.

"The fact that a vessel is American is evidence that seamen on board are Americans also.

"When a person convicted of murder accepts a 'commutation of sentence or pardon' upon condition that he be imprisoned at hard labor for the term of his natural life, there can be no question as to the binding force of the acceptance."

The opinion discusses at length the treaties between the United States and Oriental countries, and establishing extra-territorial courts sustains the power of the United States to make such treaties and to establish the courts thereunder; also *held* that constitutional limitations as to jury trials do not affect such courts.

The reasons for this are given (pp. 462–468) which, in part, are as follows:

"The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceeding what are termed the Middle Ages. During those ages, these commercial magistrates, generally des-

the only basis for the existence of the court and the validity of the sentence, which was approved by the Supreme Court,

ignated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

"The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

"We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the constitution to citizens of the United States at home, should be enjoyed by them abroad.

"In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

"It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of

was the right of Congress to legislate in order to carry out treaty provisions. The opinion is quoted at length in the notes and a few other cases bearing on this point are also

their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* vs. *United States*, 138 U. S. 157, 181. The constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United Slates, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender, would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishlishments, and applied before an American who had committed a a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun, of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47 Cong. 1st Sess. Philimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41.

referred to.[5] The statement by Chief Justice Marshall that the Federal Government, though in some ways it may be limited, is supreme within its sphere of action can certainly be applied to enable it to carry out those obligations which involve not only the material good of the nation but the maintenance of national honor and good faith.[6]

§ 391. **The construction of treaties.**—The construction of treaties as between the contracting powers, is not a part of the subject-matter of this book. How the provisions of a treaty are to be construed as to the national matters involved can be peacefully settled only by diplomacy or an international tribunal. No courts of either county can determine points of controversy or enforce any judgment based upon

[5] *United States* vs. *Lynde*, U. S. S. C. 1870, 11 Wall. 632, BRADLEY, J. In this case the Supreme Court rejected a claim made under a Spanish grant for land west of the Perdido River on the ground that it was not made effectual and within the terms of the act of 1860, which was specially passed to validate grants made by the Spanish Government to *bona fide* grantees of land in the disputed territory whilst that Government remained in possession thereof.

See other cases in regard to legislation to enforce treaty stipulations in regard to land titles and necessity of compliance therewith cited in note to § 396, *post*; and see also statutes in regard to extradition cited in § 433, *et seq.*, and notes thereto, *post*.

Henfield's Case, U. S. Cir. Ct. Penn. 1793, Wharton's State Trials, 49; Fed. Cas. 6360, JAY, Ch. J., WILSON, IREDELL and PETERS, JJ. Gideon Henfield, master of a privateer fitted out in the United States, sailing under letters of marque, was indicted and tried for violations of then existing neutrality laws or acts. He was acquitted but in the course of the various charges which were made, the law was laid down that courts of the United States had a right to enforce observance of treaties with foreign powers.

United States vs. *Rio Grande Dam & Irrigation Co.*, U. S. Sup. Ct. 1898, 174 U. S. 690, BREWER, J.

The extent of Congressional legislation to enforce provisions of Indian treaties is discussed in *United States* vs. *43 Galls. of Whiskey*, U. S. Sup. Ct. 1876, 93 U. S. 188, DAVIS, J. Same case, 1883, 108 U. S. 491, FIELD, J. Decided below in U. S. Cir. Ct. Minn., 11 Fed. Rep. 47, MCGRARY, J.

The power of the Executive under treaties and the extent to which Congress can delegate power to the Executive is discussed in *Field* vs. *Clark*, U. S. Sup. Ct. 1892, 143 U. S. 649, HARLAN, J., which involved the reciprocity clauses of the tariff act of 1890.

See also *United States* vs. *Flint*, U. S. Cir. Ct. Cal. 1876, 4 Sawyer, 42; Fed. Cases, 15,121, FIELD, HOFFMAN and SAWYER, JJ.

[6] *Cohens* vs. *Virginia*, U. S. Sup. Ct. 1821, 6 Wheaton, 264, p. 381, MARSHALL, Ch. J., see extract in note to § 1, p. 2, volume I.

an attempted adjudication. The construction of treaties, however, when they operate upon individuals within the territory of either power is a matter over which the local courts have jurisdiction and within such territory they can construe treaty stipulations and their effects. In fact the judiciary is the only department of the government which can construe a treaty or a statute.[1]

No separate chapter has been set apart for this branch of treaty law as the construction of treaties has already been referred to in connection with State[2] and Federal statutes,[3] and upon individuals when they operate without legislation,[4] It will also be considered in a subsequent chapter in other respects.[5] An excellent synopsis of rules to the construction of treaties was prepared by Mr. J. C. Bancroft Davis[6] for

§ 391.

[1] See cases cited in notes to § 320, pp. 3, *et seq.*, *ante*, and to § 460, *post.*

[2] Chapter XI, *ante*, is devoted to the construction of treaties and State statutes, and to the effect of treaties, made by the Central Government, upon individual rights of citizens of foreign countries, as the same are affected by State legislation.

[3] Chapter XII, *ante*, is devoted to the relative effect of treaty stipulations and Federal statutes.

[4] *The Head Money Cases*, U. S. Sup. Ct. 1884, 112 U. S. 580, MILLER, J., and see § 376, p. 82, *ante.*

United States vs. *Rauscher*, U. S. Sup. Ct., 1886, 119 U. S. 407, MILLER, J., and see note 3 to § 437, p. 268, *post.*

[5] Chapter XIII is devoted to treaties of cession and their effects on the rights of persons and property in the ceded territory; chapter XIV to Indian treaties and the effect of treaties and statutes affecting Indian rights and titles; chapter XV to special instances in which the treaty-making power has been exercised to its widest extent in regard to extradition, cessions, claims of United States citizens against foreign governments, trade-marks, consular courts of foreign countries in the United States, and consular courts of the United States in foreign countries. Many of the cases cited under the numerous subdivisions of these subjects determine the construction of treaties, in regard to the peculiar circumstances involved in each case.

[6] J. C. BANCROFT DAVIS' RULES FOR CONSTRUCTION OF TREATIES.

In the NOTES appended to the Compilation of Treaties between the United States and other Powers prepared mainly by J. C. Bancroft Davis, twelve rules are laid down as the determined law in the construction of treaties. Introductory Notes, pages 1227–1229, U. S. Tr.

the use of the State Department in 1873, and will be found in full in the notes to this section, together with citations of de-

and Con. 1889. The rules were originally published in the edition of U. S. Treaties and Conventions of 1873, pp. 941, *et seq.*

Those rules are as follows: The citations from Davis are given first, a reference to where the cases collated by the editor of this volume can be found follows the words *see also* under each rule.

I. A Treaty, constitutionally concluded and ratified, abrogates all State laws inconsistent therewith. It is the supreme law of the land, subject only to the provisions of the constitution. (Citing 6 Op. Att'y Gen'l 293, Cushing, and cases cited by him; *U. S.* vs. *Sch. Peggy*, 1 Cranch, 103; *Ware* vs. *Hylton*, 3 Dallas, 199; *Gordon's Lessee* vs. *Kerr*, 1 Wash. C. C. R. 322; *Lessee of Fisher* vs. *Harnden*, 1 Paine C. C. R., 55; 8 Op. Att'y Gen'l, 417 Cushing; 13 Op. Att'y Gen'l 354, Akerman.) *See also* chap. XI, *ante*.

While, however, treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights,—that is to say, in the light of politics and in the light of juridical law. The decision of political questions is pre-eminently the function of the political branch of the government, of the Executive or of Congress, as the case may be; and when a political question is so determined, the courts follow that determination. Such was the decision of the Supreme Court in cases involving boundary and other questions, under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico. (Citing *Doe et al.* vs. *Braden*, 16 Howard, 635; *Foster* vs. *Neilson*, 2 Peters, 314; *The Amiable Isabella*, 6 Wheaton, 1; *Grisar* vs. *McDowell*, 6 Wallace, 363; *U. S.* vs. *Yorba*, 1 Wallace, 412; *U. S.* vs. *Pico*, 23 Howard, 326; *U. S.* vs. *Lynde*, 11 Wallace, 632; *Meade* vs. *U. S.*, 9 Wallace, 691; *U. S.* vs. *Reynes*, 9 Howard, 127; *Davis* vs. *Parish of Concordia*, 9 Howard, 280; 5 Op. Att'y Gen'l 67, Toucey.) *See also* § 460, *post*.

II. A treaty is binding on the contracting parties, unless otherwise provided, from the day of its date. The exchange of ratifications has, in such case, a retroactive effect, confirming the Treaty from its date. But a different rule prevails when the Treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the Treaty was ratified; it is not considered as concluded until there is an exchange of ratifications. (Citing *Davis* vs. *Parish of Concordia*, 9 Howard, 280; *Lessee of Hylton* vs. *Brown*, 1 Wash. C. C. R. 343; *Haver* vs. *Yaker*, 9 Wallace, 32; *U. S.* vs. *Arredondo*, 6 Peters, 691.) *See also* § 383, pp. 127, *et seq.*, *ante*.

III. When a Treaty requires a series of legislative enactments to take place after exchange of ratifications before it can become operative, it will take effect as a national compact, on its being proclaimed, but it cannot become operative as to the particular engagements until all the requisite legislation has taken place. (Citing 6 Op. Att'y Gen'l, 750, Cushing.) *See also* § 364, pp. 66, *et seq.*, *ante*, and chapter X, vol. I.

cisions bearing upon the application of the rules respectively, which were collated by him.

IV. Where a treaty cannot be executed without the aid of an act of Congress, it is the duty of Congress to enact such laws. Congress has never failed to perform that duty. (Citing 6 Op. Att'y Gen'l 296, and cases cited, CUSHING.) *See also* chap. X, vol. I.

V. But when it can be executed without legislation, the courts will enforce its provisions. (Citing *Foster* vs. *Neilson*, 2 Peters, 314; *U. S.* vs. *Arredondo*, 6 Peters, 735.) *See also* § 364, p. 66, *et seq.*, *ante*.

VI. Where a treaty is executed in two languages, each the language of the respective contracting parties, each part of the treaty is an original, and it must be assumed that each is intended to convey the same meaning as the other. (Citing *U. S.* vs. *Arredondo*, 6 Peters, 710.)

VII. Treaties do not generally *ipso facto* become extinguished by war. Vested rights of property will not become divested in such cases. (Citing *Society for Propogation of Gospel* vs. *Town of New Haven*, 8 Wheaton, 464; *Carneal* vs. *Banks*, 10 Wheaton 182.) *See also* § 384, p. 129, *ante*.

VIII. The constitution of the United States confers absolutely on the government of the United States the power of making war and of making treaties, from which it follows that that government possesses the power of acquiring territory either by conquest or by treaty. (Citing *Am. Ins. Co.* vs. *366 Bales of Cotton* (Canter), 1 Peters, 542.) *See also* chap. II, vol. I.

IX. Such acquisition does not impair the rights of private property in the territory acquired. (Citing *U. S.* vs. *Morano*, 1 Wallace, 400.) *See also* chap. XIII, *post*.

X. A treaty of cession is a deed of the ceded territory by the Sovereign grantor, and the deed is to receive an equitable construction. The obligation of the new power to protect the inhabitants in the enjoyment of their property is but the assertion of a principle of natural justice. (Citing *U. S.* vs. *Arredondo*, 6 Peters, 710; *Soulard* vs. *U. S.*, 4 Peters, 511; *Delassus* vs. *U. S.*, 9 Peters, 117; *Mitchell* vs. *U. S.*, Ib. 711; *Smith* vs. *U. S.*, 10 Peters, 326· [*U. S.* vs. *Perchemn*, 7 Peters, 86; *Id.* vs. *Kingsley*, 12 Id. 476; *Id.* vs. *Auguisola*, 1 Wallace, 352. Under the term "property" in this connection may be placed every species of title, legal or equitable, and rights which lie in contract, executory as well as executed. *Bryan* vs. *Kennett*, 113 U. S. 179. It has been held that upon a conquest of territory, those of the inhabitants who adhere to their old allegiance and continue in the service of the vanquished sovereign, forfeit the right to be protected in their property, except so far as it may be secured by treaty. *U. S.* vs. *Repentigny*, 5 Wallace, 211.]) *See also* chap. XII, *post*.

XI. In an opinion on the legislation to carry into effect the Treaty of 1819 with Spain, Attorney-General Crittenden held that "An act of Congress is as much a supreme law of the land as a Treaty. They are placed on the same footing, and no superiority is to be given to the one over the other. The last expression of the law-giving power must prevail; and a subsequent act must prevail and have effect, though incon-

sistent with a prior act; so must an act of Congress have effect, though inconsistent with a prior treaty." (5 Op. Att'y Gen'l, 345, Crittenden; but see Opinions of Justice CHASE, 3 Dallas, 236, and of MARSHAL, Ch. J., 1 Cranch, 109, each pronouncing the opinions of the Supreme Court.) See also § 378, pp. 84, *et seq.*, *ante*.

XII. Interest, according to the usage of nations, is a necessary part of a just national indemnification. (1 Op. Att'y Gen'l, 28 Wirt; 5 Op. Att'y Gen'l 350, Crittenden; Geneva Award, 4 Papers relating to Tr. of Wash. 53.) See also § 444, *post*.

CONSTRUCTION OF FAVORED NATION CLAUSES: RECIPROCITY TREATIES.

The construction of the treaty stipulations known as "favored nation" and "equal duty" clauses has to some extent been discussed in the sections of this chapter devoted to treaty and tariff cases (see §§ 366, *et seq.*, pp. 67, *et seq.*, *ante*). The effect of these clauses are more often the subject of diplomatic correspondence than of judicial inquiry, as the courts cannot extend by judicial decision the operation of a treaty against the construction placed thereon by the political departments (see cases collated under § 460, pp. 353, *et seq.*, *post*).

Mr. JOSEPH ROGERS HEROD, M. A., formerly Secretary of Legation and Chargé d' Affaires of the United States to Japan has published during the current year (Banks Law Publishing Co., New York, November, 1901) a valuable and interesting treatise on: Favored Nation Treatment, an analysis of the Most Favored Nation Clause, with Commentaries on its uses in Treaties of Commerce and Navigation.

Mr. Herod analyzes and treats the subject as follows: 1. The favor granted to, 2, Citizens, subjects or inhabitants, in matters of, 3, commerce, and 4, navigation.

He cites many authorities on international and constitutional law bearing upon the subject, as well as a great deal of diplomatic correspondence.

The subject of reciprocity in tariff exactions is exciting considerable discussion at the present time. There are a number of treaties providing for reductions in duties which have been negotiated with France, Great Britain and other countries, but which have not yet been ratified by the Senate. The effect of favored nation clauses was recently discussed, in an able and comprehensive manner, by Hon. John A. Kasson, formerly Special Minister Plenipotentiary of the United States, in an address before the Illinois Manufacturers' Association in Chicago, October 14, 1901, which has been printed at the Government Printing Office in pamphlet form entitled: Reciprocity. The benefits which will accrue to this Country by the Confirmation of the Treaties now Pending in the United States Senate.

CHAPTER XIII.

TREATIES OF CESSION INVOLVING CHANGE OF SOVEREIGNTY OVER THE CEDED TERRITORY AND THE EFFECT THEREOF ON LAWS, PERSONS AND PROPERTY.

SECTION

392—Treatment of subject necessarily brief and superficial; wide scope of "change of sovereignty."

393—Methods of acquisition of territory; cessions during peace and at the end of war.

394—Extent of power and property which passes to the new sovereign by treaties of cession.

395—The effect on inhabitants of ceded territory; subdivisions of subject in this chapter.

395*a*—The effect on local laws of the ceded territory.

395*b*—The effect on the allegiance of the inhabitants and their personal and political rights.

SECTION

395*c*—The effect on property rights and on title to land.

396—Necessity for legislation to make treaties of cession effectual and to protect property rights.

397—Necessity for compliance with such legislation to preserve rights and property.

398—International law and its protection of property rights after cession of territory.

399—International law an element of the law of the United States.

400—Change of sovereignty discussed in this chapter only when *to*, and not *from*, the United States.

§ 392. **Treatment of subject necessarily brief and superficial; wide scope of "change of sovereignty."** — The power of the United States to acquire and govern territory was discussed, and the authorities bearing thereon were collated, in a former chapter,[1] and it is not necessary to repeat the conclusions then reached, or the historical *data* there referred to. The only branch of the subject, however, which was then considered was the power of the Central Government to acquire territory, and the extent to which Congress was limited by the Constitution in governing, or making

§ 392.

[1] Chap. III, vol. I, and see especially sections devoted to *Insular Cases*, pp. 117, *et seq.*; see also list of acquisitions, note to § 44, on pp. 79, *et seq.*, vol. I.

rules and regulations therefor; it will be proper, therefore, at this point to consider the effect of the treaties of cession, by which the boundaries of the United States have been extended, upon the laws of the ceded territory, the civil and political rights of the inhabitants thereof, and the title to property situated therein.[2] It will be impossible to cover all of these subjects in a single chapter; in fact little can be done beyond briefly summarizing some of the most important principles involved, and referring to a few of the leading authorities bearing thereon. The subject is composed of so many elements, and is so far-reaching in its effects, that if it were attempted to discuss it in a more than superficial manner this chapter would have to be expanded to the size of the volume itself in order to exhaust the general subject of change of sovereignty, and its effects on laws, persons and property.

In the succeeding sections of this chapter a number of cases will be cited which involve questions relating to change of sovereignty. While an effort will be made to classify them under appropriate sections with as little unnecessary repetition as follows, complete success in that respect will be impossible as many of the cases cited are applicable to points covered by more than one of the subdivisions into which the subject has been divided. This applies particularly to cases involving grants of land which were made prior to the cession, the validity of whereof has depended upon the construction of laws of the former sovereign as well as those of the new one.

§ 393. **Methods of acquisition of territory; cessions during peace and at end of war.**—The different methods by which territory can be acquired were stated in a previous section.[1] There are other methods of acquisition than by treaty,[2] but that is the only method which is the subject of

[2] For a list of treaties by which the United States has acquired territory, with references to the editions of treaties in which they may be found see § 44 *n.*, pp. 79, *et seq.*, vol. I. See also TREATIES APPENDIX at end of this volume.

§ 393.

[1] See § 44, p. 78, *et seq.*, vol. I.

[2] Territory has been acquired by the United States on occasions by reciprocal legislation and not by treaty: In 1845 when the Republic of Texas was admitted as a state

this chapter. The treaty may be negotiated during a time of peace or at the end of a war. The after effects on the inhabitants of the ceded territory are practically the same in either case.

Treaties of peace are, as the Supreme Court has said on more than one occasion, often treaties of cession; wars are seldom terminated without altering the boundary lines of the belligerents, either by the defeated power recognizing the sovereignty of the victorious power over disputed territory, or by actually ceding to the victor territory, which, prior to the war, was a part of its domain. Cession of, or relinquishment of sovereignty over, territory, may be exacted by the victor as indemnity or for governmental purposes.[3] The ownership of conquered territory may be asserted by the right of conquest by the power in military occupancy, and no treaty is absolutely necessary, but, as a general rule, the modern usage is to have the cession incorporated in the treaty of peace, so as to quiet all questions of sovereignty thereafter.[4]

by the joint action of the Congress of the United States, and by the acceptance of the terms stated in the Resolution of March 1, 1845, 5 U. S. Stat. at L. p. 797, by the Congress of the Republic of Texas. See Resolution of Congress admitting Texas December 29, 1845, 9 U. S. Stat. at L. p. 108. Also in 1898, when the Hawaiian Islands were annexed as territory of the United States by a Congressional resolution, July 7, 1898, 30 U. S. Stat. at L. p. 750, and the acceptance of the terms thereof by the Hawaiian Republic. In both of these instances treaties had been concluded for the purposes accomplished by legislation but had failed of ratification. These two instances, however, differ from all other acquisitions of territory of the United States in one very important respect, viz: the entire territory of the other power became territory of the United States, and the former government ceased to exist as an independent power. In all other cases the other power ceded only a portion of its territory to the United States, and its existence as a sovereign power exercising jurisdiction over other territory was not affected in any manner by the cession.

[3] After the war with Spain in 1898, Spain ceded Porto Rico, Guam and the Philippine Archipelago to the United States for which the United States relieved Spain from all claims for indemnity national and individual on the part of the United States, and paid $20,000,000, and gave certain commercial privileges in the Philippine Islands. Spain also *relinquished* sovereignty over Cuba and withdrew therefrom.

[4] Title by conquest and title by prescription are discussed in Wheaton (8th ed.), § 164, *et seq.*, p. 239, *et*

Questions have sometimes arisen as to the exact status of conquered territory ceded by a treaty of peace, but which had been conquered during the war, and still remained under military occupation upon the ratification of the treaty. The Supreme Court of the United States has described such territory as "ceded conquered territory."[5] Although the conquering power could have retained the territory as a conquest without any treaty, having finally accepted the same as a cession, it must recognize not only the obligations specifically assumed by the treaty, but also those imposed by international law

seq., and see also Phillimore, vol. 1, §§ 255–60, for a collection of authorities on this subject. It is always a difficult question to determine how long military occupation of a conquered territory must last in order that the title may be securely vested in the conqueror by prescription. One difference between the two titles is that an uprising of the inhabitants of conquered and unceded territory to regain their freedom would not be treason, while an uprising of inhabitants after title has become vested in the conqueror, either by treaty or by prescription, would be an insurrection against the government and the participants could be treated accordingly.

Great Britain claims to have conquered the South African Republic and to have annexed it as territory of Great Britain, and is attempting to govern it accordingly. There has been no cession, however, and inhabitants who organize and endeavor to throw off the British yoke could not, in the author's opinion, be treated as rioters, or as insurgents, under the rules of international law. In the case of the Philippine Islands Spain has *ceded* them to the United States by a treaty of peace and of cession; it is in the power of the United States to determine how to treat those who are fighting against the government which now exercises sovereignty over those islands. An uprising in Porto Rico, at any time after the ratification of the treaty of peace would have been a mere insurrection and the United States could have treated the insurgents as rioters.

In order to avoid all such questions as these, wars are generally terminated by treaties containing a formal cession of any territory of the defeated power which the victor desires to retain as the result of the war.

Am. Ins. Co. vs. *Canter*, U. S. Sup. Ct. 1828, 1 Peters, 511, MARSHALL, Ch. J., see extract on p. 160, *post*.

See also Glenn's International Law, chap. 19, pp. 261, *et seq.*, and authorities there cited on p. 264.

[5] The status of the territory acquired from Mexico is discussed in *Fremont* vs. *United States*, U. S. Sup. Ct. 1854, 17 How. 542, TANEY, Ch. J., and in *Merryman* vs. *Bourne*, U. S. Sup. Ct. 1869, 9 Wallace, 592, SWAYNE, J., in which it was held that (p. 601): "The conquest of California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. On that day the government of the United

in favor of the inhabitants.[6] Of all the occasions on which the United States has acquired territory since the adoption of the Constitution, in only two instances—after the war with Mexico in 1848, and after the war with Spain in 1898—was the acquisition the result of war; in both of those instances the United States paid the defeated power a large sum of money as a consideration for the cession, besides waiving demands for indemnities;[7] in both instances the United States also permitted stipulations to be inserted in the treaties as to the treatment of the inhabitants, although in both instances the United States had conquered the ceded territory and held it under military occupancy when the treaty was signed.[8]

States succeeded to the rights and authority of the government of Mexico. The dominion of the latter sovereignty was then finally displaced and succeeded by that of the former." The treaty ceding California was not ratified until nearly two years after the conquest.

[6] In *United States* vs. *Percheman*, U. S. Sup. Ct. 1833, 7 Peters 51, Chief Justice Marshall shows that the same rules as to inviolability of private property apply to conquest as to cession. (See extract from his opinion in note under § 398, p. 185, *post.*)

[7] Treaty of Peace, Friendship, Limits and Settlement, concluded February 2, 1848; ratifications exchanged May 30, 1848; proclaimed July 4, 1848; known as Treaty of Guadalupe-Hildalgo, U. S. Treaties and Conventions, edition 1889, p. 681, U. S. Treaties in Force 1899, p. 391.

Treaty with Spain of 1898, U. S. Treaties in Force 1899, p. 595.

The provisions in these treaties as to the treatment of inhabitants of the ceded territory are very liberal, and permission to retain allegiance to the former sovereign was given under the conditions expressed in the treaties.

[8] There was no question as to the whole of Porto Rico and the Island of Guam being under the military occupancy of the United States upon the signing of the protocol of August 12, 1898, in Washington, and when the treaty of December 10th was signed in Paris. It has been claimed that the control of the harbor of Manila by the fleet under Admiral Dewey after the battle of May 1, 1898, and even the subsequent capture of the city of Manila, did not necessarily carry with it the occupancy of the entire archipelago. It is not proposed to discuss that question here; mention is only made of it to show that the author has not overlooked the fact that the military forces of the United States were not in actual possession of every island.

The extent of the occupancy and its effect upon the conquest and subsequent cession of the entire archipelago may be referred to in the decisions yet to be rendered by the Supreme Court in the *Insular Cases* involving the status of the Philippines and which are still un-

§ 394. **Extent of power and property which passes to the new sovereign by treaties of cession.**—When one government acquires territory from another by treaty of cession, or even by conquest, which latter method, however, is not now under consideration, it acquires all that the former sovereign possessed at the time of the cession, so far as the ceded territory is concerned. That is to say, it acquires the right of governmental control, or of exercising sovereignty, over the ceded territory and the inhabitants thereof, and also title to the public property, government buildings and the public domain,[1] or ungranted lands. The above rule, as thus generally ex-

decided (see § 61, pp. 117, *et seq.*, Vol. I).

§ 394.

[1] *United States* v. *Clarke*, U. S. Sup. Ct. 1834, 8 Peters, 436, MARSHALL, Ch. J. In speaking of the cession of sovereignty over Florida the opinion says (p. 448) as follows:

"By the second article of the treaty of the 22d of February, 1819, between the United States of America and Spain, his catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him situated on the eastward of the Mississippi, known by the name of East and West Florida. . . . " (See extract as to public domain on p. 182, *post.*) "This article undoubtedly transfers to the United States, all the political power which our government could acquire, and all the royal domain held by the crown of Spain; but has never been supposed, so far as is now understood, to operate on the property of individuals. This court has uniformly expressed the opinion that it does not."

Dauterive vs. *United States*, U. S. Supreme Ct. 1879, 101 U. S. 700, CLIFFORD, J. This action involved the same title that was decided adversely to the claimant in (*U. S.* vs. *Dauterive*, 15 How. 14). The claim was based on alleged grants of 1717, but the claimants do not appear to have been able to substantiate the facts alleged. In regard to the rights of the United States in ungranted lands within the territory ceeded by the treaty of 1803 with France, the court says (p. 705):

"Under our treaty of cession the United States acquired in sovereignty all the lands in the province which had not before been granted by one or the other of the two prior sovereigns and severed as private property from the royal domain. It was incumbent, therefore, upon the appellants to show that the land in question had been so granted by the antecedent authorities, else the United States are entitled to recover it. *United States* vs. *King*, 7 How. 833, 849.

"Subsequent concessions were made by the Spanish authorities within this claim, which, as well as the action of the authorities in resuming the possession of the larger portion of it, show conclusively that no such right as is now claimed by the appellants was recognized by those authorities.

"Since the cession of the prov-

pressed, is of course subject to any limitations which may be included in the treaty or any accompanying documents or

ince, the right of such a claimant is the same as it would have been if the jurisdiction had not been transferred, from which it follows that rejected claims, which had no validity at the date of the treaty, impose no obligation upon the United States as the successor of the foreign sovereign."

Josephs vs. *United States*, Ct. of Claims, 1865. 1 Ct. of Claims, 197, NOTT, J. The questions of fact involved and the points of law decided in this case as stated in the syllabus, are as follows:

"*The King of Spain makes an incomplete grant of land, in Louisiana, to Anthony de St. Maxent, reserving the use of the land 'whenever he shall want it for any fortification.' Spain recedes the province to France, and France, with the consent of the Spain, cedes it to the United States 'forever and in full sovereignty.' Congress pass an act to confirm parties 'in their claim to such lands in the same manner as if their titles had been completed.' Judah Touro purchases the land of intermediate grantees, and the government enters upon it and erects Fort Jackson.*

"By the cession of Louisiana the government of the United States has succeeded to all the property and interests formerly possessed by the governments of France and Spain in that province.

"A grant to the government needs not words of inheritance; and it is as unnecessary to say 'to the King and his *assigns*,' as 'to the King and his *successors*.'

"A reservation by the King of Spain, in a grant of lands belonging to the crown, of '*the use of said land* whenever he shall want it for any fortification' is a property or thing of value. Hence the right so to use the land has passed by the terms of the treaty ceding Louisiana, and has become the property of the United States.

"The new rights acquired by a citizen of a ceded province who becomes thereby a citizen of the United States, are political and not private rights. They give to him no estate or interest in his property other than that which he previously possessed.

"The acts of Congress relating to incomplete titles in Louisiana only confirm the estates already granted by the Spanish government; they do not *enlarge* the estate of a party, nor relinquish any right or interest of the United States as successors to the King of Spain.

"A right reserved by the terms of a grant to use the land for any fortification, is something more than the right of eminent domain; it is a right to use for fortifications any portion of the tract so granted, without compensation. This reserved right, in the case at bar, has passed to the United States under the treaty of 1803, and may be enforced by them as fully as by their grantors, the governments of France and Spain."

Clark vs. *Braden*, U. S. Sup. Ct. 1853, 16 Howard, 635, TANEY, Ch. J. During the negotiations for the treaty by which Spain ceded Florida to the United States several grants were made by the King of Spain amounting to millions of acres, three of which covered all or nearly all of the public domain in the territory proposed to be

declarations which properly form a part of the treaty.[2] This rule also relates particularly to those cases in which the ceded, and when the treaty was finally ratified and exchanged it contained in one of the articles the following clause:

"All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty for the cession of the Floridas was made, are hereby declared and agreed to be null and void," and all grants made before that date were confirmed.

Prior to the exchange and ratification one of the holders of a grant gave notice that he intended to rely on a decree of December 17, 1817. The Secretary of State refused to make the ratification without a declaration that the grant in question would be void under the terms of the treaty and it was re-ratified with such a declaration by the King of Spain.

The plaintiffs in this case claimed under one of the grants in question and the Supreme Court held that the grant was null and void.

The question of the understanding of parties to a treaty of the language, obligations and stipulations was fully discussed in this case and it was held on p. 656 *et seq.* "that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged. . . . The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

"In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The

[2] For note 2 see p. 157.

ing government transfers a part of its possessions and continues to exercise sovereignty over the balance of its dominion, although its sovereignty absolutely ceases over the portion ceded.[3] In such cases the acquiring government does not assume the obligation of any indebtedness of the ceding government, even if contracted in connection with the territory ceded, unless specifically so stated in the treaty.[4]

These rules do not necessarily apply in cases where terri-

constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to and governed by their laws. And as the treaty is by the constitution the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States."

In this case prior to the ratification of the treaty the Spanish claimant made a transfer to an American citizen but it was held that this did not, in any way, affect the grant, as up to the time of the ratification of the treaty it was a part of Spanish territory and subject to the laws of Spain, and that whatever rights the American grantee might have from the Spanish claimant were extinguished by the Spanish government in the declarations exchanged in the ratifications of the treaty.

[2] *Kinkead* vs. *United States*, Ct. Claims, 1883, 18 Ct. of Clms, 504, DRAKE, Ch. J., s. c., 1889, 24 Ct. of Clms, 459, SCHOFIELD J., affirmed, U. S. Sup. Ct. 1893, 150 U. S. 483, BROWN, J. Claims to certain property conveyed by the Russian government to the United States. The right of the Russian government to make disposition as to certain property was involved. *Held* by the Supreme Court that it would not go into the question whether the Russian government had or had not the right to make the disposition, but that the court would hold as against the United States the Russian government had no right to convey a title or any property to any person and it was held that under the stipulations of the treaty this was not private property, the title to which would be unaffected by a cession. The effect of certain schedules of property annexed to documents transferring the territory was involved in this action.

[3] See the treaties of cession referred to in note 3 to § 44, p. 80, *et seq.*, vol. I, and examine for the special stipulations affecting property; for the provisions affecting recent cessions from Spain, see TREATIES APPENDIX at end of this volume where the treaty of 1898 is printed in full.

[4] For a full discussion of this subject see the record of the Peace Commission in Paris in which the position of the commissioners of the United States declining to assume any indebtedness of Spain on account of Cuba or the Philippines is set forth. Senate Document, No. 62, (3 parts) 55th Congress, 3d Session. Message of President

tory having its own government is absorbed into the United States, and, owing to the peculiar division of local and national sovereignty in this country, the local affairs can be administered under a local State constitution as in the case of Texas or of a territorial government as in the case of Hawaii. In those cases the reciprocal legislation already referred to determines many of these points. In such cases, however, the United States immediately becomes the only power having any general or national jurisdiction over the acquired or absorbed territory.[5]

It has also been held that in cases of acquisition of territory out of which States have subsequently been carved and admitted to the Union, that the United States meanwhile held the lands under water in trust for such States when finally admitted; this rule, however, is subject to exceptions where the land has been granted to an individual.[6]

McKinley transmitting treaty of peace between United States and Spain, January 4, 1899.

[5] See the resolutions in regard to Texas and Hawaii referred to in note 2 to § 393, p. 150, *ante*, and as to when laws of the United States took effect in Texas. See note 3 to § 395*a*, p. 163, *post*.

[6] *Knight* vs. *United States Land Association*, U. S. Sup. Ct. 1891, 142 U. S. 161, LAMAR, J. This case involved the San Francisco titles to Pueblo lands and in that respect the court held, as to tide waters, that the well-settled doctrine, that on the acquisition of territory from Mexico the United States acquired title to the lands under tide water in trust for the future States that might be erected out of the territory, does not apply to lands that had been previously granted to other parties by the former government, or had been subjected to trusts that would require their disposition in some other way.

"The patent of the United States is evidence of the title of the city of San Francisco under Mexican laws to the Pueblo lands, and is conclusive, not only as against the United States and all parties claiming under it by titles subsequently acquired, but also as against all parties, except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation."

Illinois Central Railroad Company vs. *Illinois*, U. S. Sup. Ct. 1892, 146 U. S. 387, FIELD, J. This case involved the title to the Chicago water front on Lake Michigan. The general rule is stated in the first point of the syllabus as follows:

"The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any por-

Although sovereignty over ceded territory and the ownership of the public domain is thus transferred, the acquiring government obtains nothing by the cession that was not governmental property or prerogative at the time of the transfer. The cession does not carry with it any private property or deprive any of the inhabitants or owners of property of any private rights which they possess. Under both international and municipal law those rights are protected and must be respected by the new sovereign.

This subject will be discussed in the following sections under appropriate subdivisions. Other points, such as when treaties of cession take effect, to what extent grants can be made by the ceding, or must be recognized by the accepting, government, will be referred to in the notes.

§ 395. **The effect on inhabitants of ceded territory; subdivisions of subject in this chapter.**—We have seen that when one government cedes to another territory forming part of its domain, and over which it has exercised sovereignty, the consent of the inhabitants is not required to validate the transfer,[1] and that as soon as the transfer has been completed, and the new sovereign has been put in possession, the inhabitants must submit to the new government; in fact, as Chief Justice Marshall said in the *Florida Case*, "to such conditions as the new master shall impose."[2] Change of sovereignty, however, results in so many changed conditions that it is impossible to briefly summarize its ef-

tion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

"The same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

See also *Shively* vs. *Bowlby*, U. S. Sup. Ct. 1894, 152 U. S. 1, GRAY, J., and the *Pollard* cases, cited in note to § 395*a*, p. 165, *post*.

§ 395.

[1] See § 46, pp. 83, *et seq.*, vol. I.

[2] *American Ins. Co.* vs. *Canter*, U. S. Sup. Ct. 1828, 1 Peters, 511, MARSHALL, Ch. J.; and see extracts from opinion in notes to § 395*a*, p. 160, *post*.

fects in any single sentence. The elements of the subject of change of sovereignty by treaty, which will be referred to in this chapter, are *first*, the effect on the local laws of the ceded territory;[3] *second*, the effect on the allegiance of the inhabitants and their personal and political rights;[4] *third*, the effect on property rights and on title to land.[5]

§ 395*a*. **The effect on local laws of the ceded territory.**— This is also a subject which is properly within the domain of a treatise on international law and to which only a passing reference can be made. The general rule is that the laws of the former sovereignty continue until altered by the law-making power of the new sovereignty; but in each case the special features of the law and its application under the new conditions must be considered. The condition of the inhabitants remains the same except as to their allegiance. As Chief Justice Marshall declared after the cession of Florida: "The same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state."[1] This principle, which

[3] § 395*a*, *post*.

[4] § 395*b*, p. 166, *post*.

[5] § 395*c*, p. 175, *post*.

§ 395*a*.

[1] *American Ins. Co.* vs. *Canter*, U. S. Sup. Ct. 1828, 1 Peters, 511, MARSHALL, CH. J. The Chief Justice's remarks above quoted are on p. 541. They were prefaced by the following statement:

"The course which the argument has taken, will require, that, in deciding this question, the Court should take into view the relation in which Florida stands to the United States.

"The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations

had already been enunciated by Sir William Scott as early as 1804,[2] has often been followed with approval.[3]

are created between them and the government which has acquired their territory."

[2] *The Fama*, High Court of Admiralty, Great Britain, 1804, 5 Robinson, 106, SIR W. SCOTT.

[3] *Leitensdorfer* vs. *Webb*, U. S. Sup. Ct. 1857, 20 Howard 176, DANIEL, J. In this case the validity of the provisional government of New Mexico was questioned in an action brought in a court established under what was known as the Kearney Code, or provisional government. As stated in the syllabus this point was decided as follows:

"When New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other, and their rights of property, remained undisturbed.

"The executive authority of the United States properly established a provisional Government which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the Territorial Government established by its authority.

"A suit brought in a court established by the provisional government was properly transferred to a court created by the act of Congress establishing the Territory of New Mexico, the jurisdiction of which was fixed by a Territorial statute." The opinion says in this respect (pp. 177–178):

"Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the civil Government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary Government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the Government of the occupants should be administered—this result being indispensable, in order to secure those objects for which such a Government is usually established.

"This is the principle of the law of nations, as expounded by the highest authorities. In the case of *The Fama*, in the 5th of Robinson's Rep. 106, Sir William Scott declares it to be 'the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their

There may, however, be occasions on which the laws and customs as they existed under the former sovereignty are so

relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed.' So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that 'the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters.' *United States* vs. *Percheman*, 7 Peters, pp. 86, 87," (see extract omitted here and quoted in note to § 398, p. 186, *post*), citing also *Mitchel* vs. *The United States*, 9 Peters, 711, and Kent's Com. vol. 1, p. 177. Then continuing:

"Accordingly we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. (*Vide* Laws of New Mexico, Kearney's Code, p. 48.) Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and re-established. The fallacy of this pretension is exposed by the fact, that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional Government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress. That no power whatever, incompatible with the Constitution or laws of the United States, or with the authority of the provisional Government, was retained by the Mexican Government, or was revived under that Government, from the period at which the pos-

incompatible with the laws and customs for the fundamental principles of the government of the new sovereignty that

session passed to the authorities of the United States."

The particular law is then discussed and the varied statutes affecting it, and the court refused to review the action of the lower court which up to that time, was interlocutory.

Fouvergne vs. *City of New Orleans*, U. S. Sup. Ct. 1855, 18 Howard, 470, CAMPBELL, J. The validity of a decree of the proper officer of the former sovereignty is established in this case as stated in the syllabus, which is as follows:

"Where a will was established in New Orleans, in 1792, by order of the alcalde, an officer who had jurisdiction over the subject-matter, his decree must be considered as a judicial act, not now to be called into question.

"The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will. An original bill cannot be sustained upon an allegation that the probate of a will is contrary to law.

"Moreover, the fraud charged in this case, is not established by the evidence."

Holden vs. *Hardy*, U. S. Sup. Ct. 1898, 169 U. S. 366, BROWN, J. In this case the 8-hour labor law (1896) of Utah was attacked on the ground that it was a violation of the Fourteenth Amendment in that it deprived the employers and employees of the right to make contracts, and on other grounds. The State courts upheld the statute and the Supreme Court declined to interfere on the ground that the regulation of labor was within the power of the State. The syllabus states (in part):

"The cases arising under the Fourteenth Amendment are examined in detail, and are held to demonstrate that, in passing upon the validity of state legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some States methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals or classes had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection: but this power of change is limited by the fundamental principles laid down in the Constitution, to which each member of the Union is bound to accede as a condition of its admission as a State."

The general question of the laws of the former sovereignty and the continuance of the system of jurisprudence in annexed territory, was referred to in the opinion, after discussing numerous cases, on pp. 388–389, as follows:

"The same subject was also elaborately discussed by Mr. Justice Matthews in delivering the opinion of this court in *Hurtado* vs. *California*, 110 U. S. 516, 530:

they cannot any longer be enforced, and in such case they become unenforceable under the new order of things.[4] These

'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.' We have seen no reason to doubt the soundness of these views. In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

"'We do not wish, however, to be understood as holding that this power is unlimited. While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amend-

[4] For note 4 see p. 166.

questions were discussed at great length in Congress after the annexation of Mexican territory under the treaty of 1848.

ment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benfit of due process or equal protection of the laws.' "

For effect of former laws of Texas and effect of laws of United States in Texas, see

Oakey vs. *Bennett*, U. S. Sup. Ct. 1850, 11 How. 33, McLEAN, J.

Calkin vs. *Cocke*, U. S. Sup. Ct. 1852, 14 How. 227, NELSON, J.

Other cases involving the question of the continuance of local laws in conquered and ceded territory and the effect of change of sovereignty thereon are:

Alexander vs. *Roulet*, U. S. Sup. Ct. 1871, 13 Wall. 386, DAVIS, J.

Chicago Ry. Co. vs. *McGlinn*, U. S. Sup. Ct. 1885, 114 U. S. 542, FIELD, J.

Chouteau vs. *Eckhart*, U. S. Sup. Ct. 1844, 2 How. 344, CATRON, J.

Clark vs. *Braden*, same as *Doe* vs. *Braden*, U. S. Sup. Ct. 1853, 16 How. 635, TANEY, Ch. J.

Cross vs. *Harrison*, U. S. Sup. Ct. 1853, 16 How. 164, WAYNE, J.

Davis vs. *Police Jury, etc.*, U. S. Sup. Ct. 1850, 9 How. 280, WAYNE, J.

Delassus vs. *United States*, U. S. Supreme Ct. 1835, 9 Pet. 117, MARSHALL, Ch. J.

Doe vs. *Braden*, U. S. Sup. Ct. 1853, 16 How. 635, TANEY, CH. J.

Foster vs. *Neilson*, U. S. Sup. Ct. 1829, 2 Pet. 253, MARSHALL, Ch. J.

Garcia vs. *Lee*, U. S. Sup. Ct. 1838, 12 Pet. 511, TANEY, Ch. J.

Grisar vs. *McDowell*, U. S. Sup. Ct. 1867, 6 Wall. 363, FIELD, J., affirming same case, U. S. Cir. Ct. Cal., 1866, 4 Sawyer 597, Fed. Cas. 5832, FIELD, J.

Higueras vs. *United States*, U. S. Sup. Ct. 1864, 5 Wall. 827, CLIFFORD, J.

Insular Cases, U. S. Sup. Ct. 1901, 182 U. S. See INSULAR CASES APPENDIX at end of volume I.

Mitchel vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 711, BALDWIN, J.

New Orleans vs. *Armas*, U. S. Sup. Ct. 1835, 9 Peters, 224, MARSHALL, Ch. J.

New Orleans vs. *Steamship Co.*, U. S. Sup. Ct. 1874, 20 Wallace, 387, SWAYNE, J.

New Orleans vs. *United States*, U. S. Sup. Ct. 1836, 10 Peters, 662, McLEAN, J.

Ortiz, Ex parte, Porto Rico Habeas Corpus case, U. S. Cir. Ct. Minn. 1900, 100 Fed. Rep. 955, LOCHRAN, J.

Permoli vs. *Municipality, etc.*, U. S. Sup. Ct. 1845, 3 How. 589, CATRON, J.

Pollard vs. *Hagan*, U. S. Sup. Ct, 1845, 3 How. 212, McKINLEY, J.

Pollard's Heirs vs. *Kibbe*, U. S. Sup. Ct. 1840, 14 Pet. 353, THOMPSON, J.

Soulard vs. *United States*, and cited as *Smith* vs. *United States*, U. S. Sup. Ct. 1830, 4 Peters, 511, MARSHALL, CH. J.; U. S. Sup. Ct. 1836, 10 Peters, 100, BALDWIN, J.; 10 Peters 326, BALDWIN, J.

Strother vs. *Lucas*, U. S. Sup. Ct. 1832, 6 Pet. 763, THOMPSON, J.

United States vs. *Arredondo*, U. S. Sup. Ct. 1832, 6 Pet. 691, BALDWIN, J.

United States vs. *Castillero*, U. S. Sup. Ct. 1862, 2 Black, 1 p. 320, CLIFFORD, J.

By the laws of Mexico slavery was prohibited, and in framing the laws establishing territorial governments of New Mexico and other portions of the acquired territory the pro-slavery element in Congress endeavored to legislate slavery into the territories while the anti-slavery element endeavored to exclude it. Owing to the prohibition of slavery under Mexican law the anti-slavery element maintained that slavery would be illegal until actually permitted by some act of Congress which expressly repealed, or superseded, the laws of Mexico as they existed at the time of the cession.[5]

§ 395*b*. **The effect on the allegiance of the inhabitants and their personal and political rights.**—Personal rights and citizenship have a somewhat different standing in court than rights affecting property which will be separately considered in the following sections. The latter class of rights may become so vested that they cannot, under rules of equity, justice and international law, be disturbed, while personal rights where no property interests are involved remain wholly under governmental control, except so far as they are protected by constitutional guarantees.[1]

In cases of cession of territory the rights and liberties of the inhabitants are often determined by provisions of the

United States vs. *King & Coxe*, U. S. Sup. Ct. 1845, 3 How. 773; and 1849, 7 How. 833, TANEY, Ch. J.

United States vs. *Percheman*, U. S. Sup. Ct. 1833, 7 Pet. 51, MARSHALL, CH. J.

United States vs. *Repentigny*, U. S. Sup. Ct. 1866, 5 Wall. 211, NELSON, J.

United States vs. *Reynes*, U. S. Sup. Ct. 1850, 9 How. 127, DANIEL, J.

A few English cases which were cited in the arguments and opinions of the *Insular Cases* are also referred to as follows:

Blankard vs. *Galdy*, King and Queens Bench, 5 William and Mary, 4 Mod. 222, PER CURIAM.

Calvin's Case, Court Exch. Chamber, 6 James I, 4 Coke 1.

Campbell vs. *Hall*, Kings Bench, 15 Geo. III, Cowper 204, Lord MANSFIELD.

The Fama, High Court of Admiralty, 1804, 5 Robinson, 106, SIR W. SCOTT.

Penn vs. *Lord Baltimore*, High Ct. of Chancery, 1750, 1 Vesey Sen. 445, HARDWICKE, LD. CHAN.

[4] *In re Sah Quah, The Alaska Slavery* case, U. S. Dist. Ct., Alaska, 1886, 31 Fed. Rep. 327, DAWSON, J.

[5] See chap. II, vol. I of Rhodes' History of the United States from the Compromise of 1850, although the records of Congress for that period are the best authority on the subject.

§ 395*b*.

[1] See note to §10, p. 14, *ante*. For authorities on this subject con-

treaty;[2] this is especially the case in regard to citizenship.[3] Whether the treaty-making power can annex territory to

sult Wharton's Digest of International Law, vol. I, pp. 8., *et seq.;* for difference between civil and political rights see *Murphy* vs. *Ramsey*, U. S. Sup. Ct. 1885, 114 U. S. 15, MATTHEWS, J.

[2] Under the decisions already delivered in the *Insular Cases*, 182 U. S., (§§61*a*-61*h*, pp. 117-128, vol. I, and INSULAR CASES APPENDIX at the end of volume I) Congress is not bound by some of the Constitutional limitations in legislating for the territories, notably the uniformity clause in regard to imposts. These decisions however, do not affect the author's contention that when such personal rights are involved, as have been declared by the Supreme Court to rest upon the fundamental principles of our government (see chap. 1, §§ 36-41, pp. 62, *et seq.*, vol. I), the Courts have power to nullify all Congressional action which would interfere with the exercise of such personal rights as under our system of government can, and should be, exercised, and enjoyed, by the inhabitants of any territory which is under the jurisdiction of the United States.

[3] For an exhaustive review of this subject, with extracts from treaties with France for cession of Louisiana, with Spain for cession of Florida, with Mexico for cessions of 1848 and 1853, with Russia for cession of Alaska, and with Spain for the cessions of 1898, see argument of Attorney General of the United States in *Goetze* vs. *United States*, Insular Cases Record, pp. 165-173.

Besides authorities on international law and the cases there cited, see also the following:

Dawson vs. *Godfrey*, U. S. Supreme Ct. 1808, 4 Cranch, 321, JOHNSON. J. *Quere* whether a person born in England while Maryland was a colony of Great Britain was an alien or whether he could inherit from a citizen of the United States prior to the treaty of 1794; *held* that he could not. *Calvin's case* (English) distinguished.

United States vs. *Repentigny*, U. S. Sup. Ct. 1866, 5 Wallace, 211, NELSON, J. *Held* in rejecting a claim made by the heirs of a French Canadian family for a tract of 200,000 acres in Michigan granted by the crown of France prior to 1750 (as stated in the syllabus):

"1. On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property except so far as it may be secured by treaty.

"2. Hence, where on such a conquest, treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided that they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

"3. Where a British Canadian subject has conveyed to a citizen of the United States, lands in what are now the United States, which lands subject holds under a grant

the United States and reserve for Congress the right to establish the status of the inhabitants, and the extent of political rights and liberties guaranteed by the Constitution

made to a French ancestor by the King of France in 1750, before Canada passed to great Britain under its conquest in 1760, and while it yet was a French province, and embraced that part of what is now the United States containing them, the title is no longer a French, or English, but an American title, held under the laws of the United States, and subject to them.

"4. *Semble.* Where congress authorizes a court to hear a question of title, such as is above described, to which the United States is a party, and in adjudicating it to be governed by the law of nations and of the country from which the title was derived; by principles of natural justice and according to the law of nations and the stipulations of treaties, an objection of mere alienage and consequent incapacity to take or hold, must be regarded as waived."

Town vs. *DeHaven*, U. S. Cir. Ct. Oregon, 1878, 5 Sawyer, 146, Fed. Cas. 14,113, DEADY, J.

McKay vs. *Campbell*, U. S. Dist. Ct. Oregon, 1871, 2 Sawyer, 118, DEADY, J.

In re Sah Quah, Alaska Slavery Case, U. S. Dist. Ct. Alaska, 1886, 31 Fed. Rep. 327, DAWSON, J.

Jones vs. *McMaster*, U. S. Sup. Ct. 1857, 20 Howard, 8, NELSON, J. Questions of alienage of citizens of Texas after the treaty of 1848 were settled in this action.

Boyd vs. *Nebraska ex rel. Thayer*, U. S. Sup. Ct. 1892, 143 U. S. 135, FULLER, CH. J. Extended reference is made to this case on account of the numerous cases cited in the opinion bearing on the question of citizenship in territory acquired by treaty.

It was a *quo warranto* action to test the right of Governor Boyd to the governship of the State of Nebraska, the relator claiming that he was not a citizen of the State and therefore ineligible. It also involved the extent of power of the United States over its territories, and the power of Congress to naturalize all of the inhabitants of a certain territory at once without regard to constitutional provisions in regard to uniformity of naturalization laws.

In reversing the lower courts, and deciding that Boyd was to be considered a naturalized citizen of the United States and of the State of Nebraska, the Chief Justice discussed at length numerous instances in which inhabitants of various districts had been naturalized *en bloc*, and sustained the jurisdiction of Federal Courts on the ground that it was a federal question whether the inhabitants of Nebraska had, or had not, been admitted to citizenship when the territory was admitted as a State; also that such question could be raised in an action of *quo warranto*.

After stating that the lower court had found that Boyd was not a citizen, the opinion says (p. 161):

"Arrival at this conclusion involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and jurisdiction to review a decision against such right or privilege nec-

is one of the questions which must eventually arise under the treaty of 1898 with Spain and be determined by the Su-

essarily exists in this tribunal. *Missouri* vs. *Andriano*, 138 U. S. 496. Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts, it is 'a case,' and if a defence is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of the State, this court has jurisdiction by writ of error.

"We do not understand the contention to involve, directly, a denial of the right of expatriation, which the political departments of this government have always united in asserting, (Lawrence's Wheaton, 925; Whart. Confl. Laws, section 5; 8 Op. Att'y Gen. 139; 9 Op. Att'y Gen. 356; Act of Congress of July 27, 1868, 15 Stat. 223, c. 249; Rev. Stat. section 1999,) but that it is insisted that Boyd was an alien upon the ground that the disabilities of alienage had never been removed, because he had never been naturalized.

"Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen, and relator's position is that such adoption has neither been sought nor obtained by respondent under the acts of Congress in that behalf.

"Congress in the exercise of the power to establish an uniform rule of naturalization has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous."

The opinion then refers to numerous instances of naturalization both as to Indians and as to foreign countries, and cites numerous cases in which, after the acquisition by the United States of Florida and Louisiana, as well as after the treaty of peace, inhabitants became citizens. Stress is laid on the following cases: *United States* vs. *Ritchie*, 17 How. 525, 539; *Inglis* vs. *Trustees, etc.*, 3 Peters, 99; *McIlvaine* vs. *Coxe*, 4 Cranch, 209; *Crane* vs. *Reeder*, 25 Michigan, 303; *Desbois's Case*, 2 Martin, 185; *United States* vs. *Laverty*, 3 Martin, 733; *Attorney General* vs. *Detroit*, 78 Michigan, 545; *American Insurance Co.* vs. *Canter*, 1 Peters, 511; *McKinney* vs. *Saviego*, 18 How. 235. (For full titles, etc., see table of cases in vol. I.)

The general trend of all these decisions is expressed on page 169, after referring to the finding Committee on Elections of the House of Representatives in the case of David Levy, who had been elected a delegate from the territory of Florida, and whose election was disputed on the ground of non-citizenship and quoting as follows:

"'It matters nothing whether the naturalization be effected by act of Congress, by treaty or by the admission of new States, the provision is alike applicable. . . .

"'No principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning, in questions of citizenship, should always be in favor of the claimant of it,' and that lib-

preme Court.[4] Up to this time, although several attempts which have been made to raise the issue, there has been no direct decision thereon.[5]

The cases involving the effect of treaties in general upon individual rights, collated under a previous section, in many instances are applicable to points involving the protection of personal rights under treaties of cession.[6] The allegiance of the inhabitants changes at once to the new sovereign to which they must necessarily occupy the relations of citizens or subjects as the treaty and the subsequent legislation based thereon shall determine.[7] If, however, the treaty contains

erality of interpretation should be applied to such a treaty, is well worthy of perusal. (Contested Elections, 1834, 1835, 2d Session, 38th Congress, 41.)"

After reviewing a number of cases of collective naturalization, the opinion says, on page 170:

"Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.

"Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress."

After discussing the special laws involved and the facts the court held that the governor was a citizen.

Mr. Justice FIELD dissented.

[4] Articles IX, X, XI, XII and XIII of the treaty with Spain of 1898 relate to the citizenship of inhabitants of the ceded territory: 30 U. S. Stat. at L. 1759, *et seq.*; the treaty is included in full in the TREATIES APPENDIX at the end of this volume.

[5] *Ex parte Baez*, U. S. Sup. Ct. 1900, 177 U. S. 378, FULLER, Ch. J. Motion for writ of *habeas corpus* denied or ground that as the restraint (imprisonment for a very brief period for misdemeaner committed in Porto Rico) would be terminated before the motion could possibly be heard and decided.

In re Vidal, U. S. Sup. Ct. 1900, 179 U. S. 126, FULLER, Ch. J. Application for leave to file petition for certiorari to review proceedings of military tribunal.

Ex parte Ortiz, U. S. Cir. Ct. Minn. 1900, 100 Fed. Rep. 955, LOCHRAN, J. Writ of *habeas corpus* denied; but see views expressed in opinion as to effect of treaty of cession on private rights; these views must to some extent be *obiter* as the court declined to grant the writ.

[6] See § 376, p. 82, *ante*.

[7] The treaties with France, Mexico and Spain for the cessions heretofore acquired from them, all substantially provided:

provisions enabling the inhabitants, or any of them, to retain their allegiance to the former sovereign those who come within the terms of the treaty must comply strictly with the imposed conditions in order to avail of the right to retain their former allegiance.[8] There is frequently a differ-

"The inhabitants of the ceded territory *shall be incorporated in the Union* of the United States, and admitted *as soon as possible*, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

The Alaska treaty stipulated that—

"The inhabitants . . . with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

A part of the same joint resolution by which the Hawaiian Islands were annexed provided that they are—

"Annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, . . . and *until legislation is enacted* extending the United States customs laws and regulations to them the existing customs regulations of the Hawaiian Islands with the United States *shall remain unchanged.*"

On the other hand the recent treaty with Spain provides:

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, . . . in case they remain in the territory (they) may preserve their allegiance to the Crown of Spain by making before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance, in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside. The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by the Congress.*" Extract from brief in *Insular Cases*, see Record, p. 256.

[8] See the American Passport, compiled by Gaillard Hunt and published by the State Department, 1898, pp. 97, *et seq.*, and Davis' notes to U. S. Treaties and Conventions, edition 1889, pp. 1262, *et seq.*, for reference to citizenship of inhabitants of annexed territory.

ATTORNEY GENERAL GRIGGS ON CITIZENSHIP IN CEDED TERRITORY.

Questions of citizenship of the inhabitants of the ceded territory were discussed in the *Insular Cases* recently decided by the Supreme Court. The following extract from the Attorney General's argument shows the position taken by the Executive in regard to this question. No decision of the court was made on this point (Insular Cases Record, pp. 307-312).

ence in the status of civilized and native, or uncivilized, inhabitants, which is either provided for in the treaty by

"THE CONCEDED POWER TO ACQUIRE TERRITORY BY TREATY OR BY CONQUEST INCLUDES THE RIGHT TO PRESCRIBE WHAT TERMS THE UNITED STATES WILL AGREE TO IN FIXING THE FUTURE STATUS OF ITS INHABITANTS.

"The United States may stipulate that all subjects of the ceding or conquered government shall be removed; or that certain classes of them shall remove; or that a time may be given within which those desiring to retain their former citizenship or allegiance may declare their option to do so.

"By what principle does the mere presence of a subject of the former sovereign in the ceded district entitle him to be considered a citizen of the United States? Can he be made such by operation of law against his will? Can he be made such by operation of the Constitution in spite of the treaty? If the treaty may suspend the operation of the Constitution in its own vigor long enough to permit the inhabitants to consider and decide whether they will become citizens or not, why can not it suspend citizenship forever? If one year can be properly stipulated, why not ten years, or twenty, or fifty?

"The acquiring nation does not need to accept the population as its own people. If it takes the cession reserving the right to fix the status of the inhabitants of Territories, is that more against established doctrine than to insist that they shall not be taken at all?

"Suppose a cession of a small island with a half dozen inhabitants is desired as a fort, or a military reservation, or a coaling station, or a place to land a cable, must the United States agree to permit those inhabitants to remain and accept them as citizens? Why should this Government be considered to have less power in this respect than other nations? What clause of the Constitution so compels? It has the absolute, untrammeled power of making war; it has the absolute, untrammeled power of making peace. So have other nations. Why should this nation be restrained by its own Constitution so that it can not make an advantageous bargain for itself whenever it compels a peace, or when it is compelled, if it ever should be, to make a peace? And if this restriction preventing us from treating the inhabitants of ceded territory as anything but citizens exists, how does it resist the right of the uncivilized tribes in Alaska and in the Mississippi and New Mexican regions to be counted as citizens? If there is an inherent principle in the Constitution which makes all citizens who are inhabitants, how is it that the 1,335 'free people of color' in New Orleans in 1803 did not then or subsequently become citizens?

"The argument of Chief Justice TANEY in *Scott* vs. *Sandford* is that the term "people" in the Declaration of Independence and in the Federal Constitution was synonymous with citizens, and meant the same thing, and did not include the Indians nor the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not.* (19 How. 404, *et seq.*) And, not being citizens, they can

limiting the provisions of citizenship to civilized inhabitants, or by the United States classifying the uncivilized inhabitants with our own aborigines and governing them as *In-*

claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States (p. 404), and had no rights or privileges but such as those who held the power and the Government might choose to grant them (p. 405), and might justly and lawfully be reduced to slavery for the benefit of the white race.

"They were not embraced in the term 'free inhabitants' in the Articles of Confederation, and could not be naturalized under the Federal powers of naturalization (p. 420).

"That was what Chief Justice TANEY said, limiting thereby the terms 'inhabitants' and 'citizens' to the white inhabitants of the United States. And he derived that from a consideration of what was meant by 'the people of the United States.' It was to protect a citizen of a State and of the United States in taking his property, to wit, Dred Scott, into a place where Congress had said slavery should not exist; it was to protect a citizen, a white citizen, in the ownership of a black man that he laid down this definition of what constituted the people of the United States.

"The political status of native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession. A long line of special treaties with such tribes, and numerous acts of legislation by Congress on the subject of Indians and Indian rights, show that these people have always been regarded as quasi foreign.

"And the decisions of this court are to the same effect: *Cherokee Nation* vs. *Georgia*, 5 Peters, 1, 17; *United States* vs. *Rogers*, 4 Howard, 567, 572; *Johnson* vs. *McIntosh*, 8 Wheat. 543, 574; *The Cherokee Tobacco*, 11 Wall. 616.

"In the case of *Elk* vs. *Wilkins* (112 U. S. 94, 101), this court declared:

"'The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* vs. *Sandford*, 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside.

"'This section contemplates two sources of citizenship, and two sources only—birth and naturalization—and the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.'

"I refer further, but will not take time to read, to the language of

dians under the constitutional provisions which provide for their government.[9]

[9] This subject is treated at length and cases cited in § 420, pp. 229, *et seq.*, *post.*

Judge Deady in the case of the *United States* vs. *Osborne* (6 Sawyer, 406, 409), which is quoted in *Elk* vs. *Wilkins* in this court with approval.

"If, therefore, it be asserted that the 'inhabitants' of territory ceded by treaty become *ipso facto*, and without reference to the stipulations of the compact, citizens of the United States, by what principle were 'free persons of color' in Louisiana and Florida considered as without the class of citizens? They were not excepted by the treaty: nevertheless they were not regarded as entitled to the political privileges guaranteed by that instrument. Mr. Jefferson himself seems to have considered the 'white' inhabitants alone entitled to be made citizens, as is evident from his draft of a proposed amendment to the Constitution.

"Now the force of all this is that the terms 'people of the United States' and 'citizens of the United States' originally referred to the people of these States, and to such as Congress should, by naturalization or by treaty stipulation, make citizens, and nothing since, except the fourteenth amendment, has enlarged the class of people who may become citizens. That made the free negro a citizen, but it did not make those citizens who belonged to other races in other climes in the distant islands of the sea, uncivilized tribes in Sulu or Panay, uncivilized tribes in Tutuila, or uncivilized tribes in Alaska. It did not refer to them.

"But the doctrine maintained here against the Government is not only that such persons may properly be made citizens and become a part of that potentiality known as the people of the United States, but that there is no power on earth, neither in the President and Senate, nor in the Congress, nor in the courts, nor anywhere else, that will enable the United States to secure the title to a foot of land anywhere, unless it makes the inhabitants, whether they be cannibals, or whether they be wild savages, no matter how unfit they may be to exercise the duties of citizens—unless it makes them citizens. Discretion all gone, power of discrimination all gone! Our forefathers who believed in Anglo-Saxon liberty as enforced and illustrated by the Anglo-Saxon race, who believed in the common law as derived from the parent country and administered by colonists from parent countries, in providing the powers of the government they were forming, were so short-sighted, so unwise, that they made a constitution by which they could not for any purposes which the ages might disclose as useful or beneficial, acquire title to any foreign territory, unless with it they brought the inhabitants, no matter how incongruous, into the fold of 'the people of the United States,' subjecting them to the rules and principles of the common law and laying upon them the obligation and the duty of understanding the privileges and the conduct that should distinguish an American citizen.

§ 395c. The effect on property rights and on title to land.—Notwithstanding the extraordinary powers possessed

"Did our forefathers hamper us like that? If so, this Government was as misshapened as Richard the Hunchback:

> Deformed, unfinished, sent before its time
> Into this breathing world, scarce half made up,
> And that so lamely and unfashionable,
> The nations laugh at us as we halt by them.

"*Nothing can be clearer than that the universally accepted view in the time of Jefferson was, and always has been, that only they are citizens who are made such by the voluntary action of the United States, expressed either in the treaty of annexation, by act of Congress, or by process of naturalization.*

"This Government cannot have citizens thrust upon it against its will. Experience and decision go to prove that the mere acquisition of territory does not confer political rights upon the inhabitants; that the Government cannot be made to receive people as citizens except by its consent and co-operation, while it may acquire territory, and, therefore, sovereignty over the inhabitants without admitting them to the status of citizens of the United States.

"The privileges of citizenship under our Constitution do not arise out of our ownership of the lands, nor out of the fact of national sovereignty over the inhabitants, notwithstanding they owe allegiance to the Government. Citizenship arises only from birth within the United States, or from naturalization; the former being a condition allowed by the Constitution, and the latter one permitted or denied at the will of Congress or the treaty-making power. I regard the admission of citizens by stipulation in a treaty as only a form of general naturalization.

"The rule of international law applicable to the inhabitants of territory transferred from one sovereignty to another is stated by Halleck:

"'The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to became or not to become its subjects. Their obligations to the former government are cancelled, and they may or may not become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new state, and is not unjust toward

by every government over the affairs and property of its subjects and citizens when dealing with other governments, es-

those who determine not to be become its subjects. According to this rule, *domicile*, as understood and defined by public law, determines the question of transfer of allegiance, or, rather, is the rule of evidence by which that question is to be decided.' (Halleck's International Law, vol. 2, sec. 7, p. 475, 3d ed.)

"It is at the option of the inhabitants whether or not they will become subjects of the new sovereign (assuming that no expatriation is demanded), but it is at the option of the sovereign whether they shall become citizens or not.

"In *United States* vs. *De Repentigny* (5 Wall. 211, 260), it was expressly laid down as a rule of public law that the conqueror, who shall obtain permanent possession of the enemy's country, has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.

"Hall, in his Treatise on International Law (4th ed. 1895, p. 593), declares one of the effects of a conquest to be 'to invest the conquering State with sovereignty over all subjects of a wholly conquered State and over such subjects of a partially conquered State as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the State and are naturalized *for external purposes, without necessarily acquiring the full status of subjects or citizens for internal purposes.*'

"Now that is the position of the Government in this case, that when the United States acquire territory with inhabitants, unless the treaty fixes their status, they become for external purposes, in our relations with foreign countries, the subjects of the United States, entitled to its full protection, but they do not become citizens of the United States. They do not acquire the status of citizens of the United States within the constitutional meaning of that word.

"The effects of a cession by a treaty concluded on the basis of *uti possidetis*, and of conquest, upon the inhabitants of territory which changes hands at the conclusion of a war are identical. (Idem, p. 593, par. 206.)

"It has been usual in treaties to insert provisions regarding the future political status of the inhabitants, and securing to them their property rights, and in some instances certain immunities and privileges. A common provision of this kind is one securing liberty to the inhabitants of the ceded territory to retain their nationality of origin.

"The appropriateness of thus regulating by treaty the rights and status of the inhabitants may be said to be now universally recognized and followed by all civilized powers.

"The power of the United States to make by treaty the stipulations upon this subject common to other nations is one flowing out of its national sovereignty, and is not restrained by any express language of the Constitution or by any implication from any provision contained in that instrument.

"Hence, we find in every treaty by which the United States has ac-

pecially when the peace and welfare of the community is involved, property rights are sacred and cannot be affected

quired territory the rights and status of the inhabitants have been, to some extent, regulated and provided for, but not by a uniform method, but with extreme variance, indicating that the Presidents and Senates were acting in the belief that this Government possessed in this respect all the powers of any other nation.

"'*Louisiana.*—The inhabitants to be incorporated in the Union of the United States and admitted *as soon as possible* . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

"'*Florida.*—Identical with Louisiana.

"'*Mexico.*—Mexicans who did not elect to retain their former citizenship should be incorporated into the Union and be admitted *at the proper time* (not immediately, *proprio vigore* of the treaty), to be judged of by the Congress of the United States to the enjoyment of all the rights of citizens of the United States.

"'*Alaska.*—The inhabitants who remain three years, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights etc., of citizens of the United States.

"'*Porto Rico.*—Allows one year for Spaniards to elect to retain former citizenship, and provides that the civil status and political rights of the native inhabitants shall be determined by the Congress.'"

"The treaty-making power of the Government has therefore exercised the right to deal with the status of the inhabitants of ceded territory in every treaty of cession from 1803 to 1898. The status fixed has not been uniform, but exceedingly varying.

"The inhabitants of Louisiana and Florida were to be admitted to citizenship '*as soon as possible*,' not immediately, but at a later date, impliedly to be fixed by Congress. But it has never been considered that this included *all* the inhabitants, but only the free inhabitants, and excluded the Indian tribes, though not so expressed.

"The inhabitants of New Mexico and California were to be admitted to citizenship '*at the proper time*,' not immediately, but at a proper time '*to be judged of by the Congress.*'

"Alaskans who remained three years were admitted without further action by Congress or otherwise, but native tribes were excepted.

"We find, therefore, great and varying discriminations in the treaties on this subject. No one of them admits all the inhabitants. None admits the inhabitants to immediate citizenship.

"Those that guarantee citizenship to certain classes of the inhabitants —Louisiana, Florida, New Mexico, and California—do not grant it at once, but leave the declaration or promise of the treaty to be performed by Congressional act at a future day; 'as soon as possible;' 'at the proper time;' 'to be judged of by the Congress.'

"This course of dealing with the inhabitants of ceded territory in the treaty of cession establishes beyond question that the Presidents and the Senates have always believed that the status of such inhabitants

by transfer of sovereignty;[1] and by the term "property" as applied to lands was held by Chief Justice Marshall to comprehend "every species of title inchoate or complete. It is supposed," he said, "to embrace those rights which lie in contracts; those which are executory as well as those which are executed."[2] The Supreme Court of the United States decided at an early day, in fact as soon as the cases arising under the Louisiana cession came before it, that the transfer of sovereignty over territory by a foreign power to the United States would not affect the private property of the inhabitants.[3]

was a subject which could properly and constitutionally be settled by the treaty itself or referred to the subsequent action of Congress.

"Such a practice is absolutely opposed to the doctrine that 'the Constitution follows the flag,' and that when territory is ceded to the United States the inhabitants become immediately *proprio vigore* citizens of the United States. If that doctrine be true, every treaty that has brought us new lands and new inhabitants has violated in this respect the principles of the Constitution. It convicts of error and usurpation Thomas Jefferson, James Madison, James Monroe, James K. Polk, Franklin Pierce, Andrew Johnson, their Cabinets, and the Senates that ratified their treaties."

The views of the other counsel and many cases bearing on the question discussed by the Attorney General and referred to in the foregoing extract can be found by examining the Insular Cases Record. (Consult Analytical Index at front of the Insular Cases Record.)

§ 395c.

[1] *American Ins. Co.* vs. *Canter*, U. S. Sup. Ct. 1828, 1 Peters, 511, MARSHALL, Ch. J., and see extracts from this opinion in § 386 and note 1 thereunder, p. 132, *ante*. Many of the cases cited in note 2 of § 386 apply to this question also.

[2] *Soulard* vs. *United States*, *Smith* vs. *United States*, U. S. Sup. Ct. 1830, 4 Peters, 511, MARSHALL, Ch. J. Same cases appear later, 1836, 10 Peters 100 and 326, BALDWIN, J.

[3] *United States* vs. *Percheman*, U. S. Sup. Ct. 1833, 7 Peters, 51, MARSHALL, CH. J. As stated in the syllabus of this case, the Chief Justice declared: "Even in cases of conquest, it is very unusual for the conqueror to do more than to display the sovereignty and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relation to each other and their rights of property remain undisturbed." See extract from opinion in this case in note to § 398, p. 186, *post*.

As there are several hundred cases, involving questions of title to land under grants from the former sovereign, in the Supreme Court Reports they cannot all be collated in this volume; references will be made to other collections of cases on this point,[4] and therefore a few of the leading authorities only will be cited in the notes.[5] In many cases the

[4] See Kinney's Digest, United States Supreme Court Decisions, by Jonathan Frederick Kinney, 1789–1884. Little, Brown & Co., Boston, 1886, vol. 2, pages (columns) 1189–1232. *Lands of United States—Grants from foreign Governments*, subdivisions as follows:

§§ 1–210: *Effect of Treaties of Cession, in general — Grants protected—Grants in what Territory, of what Lands, and to what Persons —How and when made and here of Delivery of Possession, of Maps, Records, Surveys, etc. — Made by what officers—How shown and how construed.*

§§ 211–241: *Abandonment and Forfeiture of such Titles, and here of Conditions.*

§§ 242–264: *Direct Legislative Confirmation of Inchoate Titles derived from such Governments.*

§§ 265–395: *Confirmation through Commissions, etc.—In general, and here of Acts providing therefor and of Proceedings by Commissioners and Courts, Jurisdiction, Parties, Subject-matter, Practice, Limitations.*

See also Danforth's Supreme Court Digests, Vols. 1–115 U. S., under title California Land Claims, and other appropriate titles for many cases involving effect of change of sovereignty on land titles classified.

[5] Some of the cases involving titles after change of sovereignty and in which private rights have been protected are:

Delassus vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 117, MARSHALL, Ch. J.

Chouteau vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 147, MARSHALL, Ch. J.

The term property is to be construed very broadly in this respect:

Bryan vs. *Kennett*, U. S. Sup. Ct. 1885, 113 U. S. 179, HARLAN, J.

Delassus vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 117, MARSHALL, Ch. J.

Slidell vs. *Grandjean*, U. S. Sup. Ct. 1883, 111 U. S. 412, FIELD, J.

But titles to be protected must have existed at the time of the treaty:

Blight vs. *Rochester*, U. S. Sup. Ct. 1822, 7 Wheaton, 535, MARSHALL, Ch. J.

Craig vs. *Radford*, U. S. Sup. Ct. 1818, 3 Wheaton, 594, WASHINGTON, J.

Harnden vs. *Fisher*, U. S. Sup. Ct. 1816, 1 Wheaton, 300, MARSHALL, Ch. J.

Orr vs. *Hodgson*, U. S. Sup. Ct. 1819, 4 Wheaton, 453, STORY, J.

Hughes vs. *Edwards*, U. S. Sup. Ct. 1824, 9 Wheaton, 489, WASHINGTON, J.

Shanks vs. *Dupont*, U. S. Sup. Ct. 1830, 3 Peters, 242, STORY, J.

McKinney vs. *Saviego*, U. S. Sup. Ct. 1855, 18 Howard, 235, CAMPBELL, J.

Tobin vs. *Wilkinshaw*, U. S. Cir. Ct. Cala. 1855–6, 1 McAllister, 26, 151, 186; Fed. Cas. 14068–69–70, McALLISTER, J.

treaties of cession provided for the protection of the property rights of individuals, but the Supreme Court has decided that even in the absence of treaty stipulations the rules and principles of international law would protect the inhabitants of ceded territory in their vested rights.[6] As will be stated in the next section, however, the inhabitants and other owners of property in the ceded territory must comply with such laws as the new sovereign may enact in order to protect their rights.

§ 396. **Necessity for legislation to make treaties of cession effectual and to protect property rights.**—How far Congressional legislation is necessary to make a treaty of cession effectual depends largely upon the nature of the treaty and the various stipulations therein. We have already seen that the Supreme Court has recently decided in the *Insular Cases* that no legislation is necessary to make the ceded territory domestic instead of foreign.[1] As to property rights, however, and the status of the inhabitants, legislation is at times necessary to render the stipulations of the treaty effectual.[2] In regard to ownership of real estate,

Callsen vs. *Hope*, U. S. Dist. Ct. Alaska, 1896, 75 Fed. Rep. 758, DELANEY, J., held that the title to certain church property referred to in an inventory, and designated on a map, which were attached to the protocol in the transfer of Alaska under the treaty of cession of 1867 must be protected. See also cases cited in note 2 to § 394, p. 157, *ante*.

McGregor vs. *Comstock*, N. Y. Sup. Ct. 1853, 16 Barb. 427, EDWARDS, J.

[6] See § 398 and notes thereunder, p. 185, *post*.

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[1] *DeLima* vs. *Bidwell*, U. S. Sup. Ct. 1901, 182 U. S. 1, BROWN, J., and see INSULAR CASES APPENDIX at end of Vol. I.

[2] See Acts of Congress passed after the treaty with Spain of 1898 and referred to in notes under § 308, pp. 441, *et seq.*, Vol. I.

For some of the acts affecting titles in Louisiana, Florida and Mexico see 2 U. S. Stat. at L. p. 324; 3 Ib. 709, 754; 4 Ib. 495; 9 Ib. 681; many other acts have also been passed providing for methods of determing title to property in ceded territory.

One of the most important acts is that establishing the Court of Private Land Claims passed March 3, 1891, 26 U. S. Stat. at L. p. 854. The entire act, the rules adopted by the Court, and a collection of laws of New Spain and Mexico will be found in: Spanish and Mexican Land Claims, by Matthew G. Reynolds, United States attorney for the Court of Private Land Claims, St. Louis, 1891.

The power of Congress to establish the Court of Private Land Claims and to give an appeal therefrom to the Supreme Court of the

Congress has often passed acts appointing commissions to investigate titles, and required claimants to prove their titles in order to retain ownership.[3] One reason for this course is that as all the public land in the ceded territory passes to the United States and becomes part of the public domain, the government has the right to require proof of ownership of property in order to determine the extent of public domain. Many of the cases referred to in the preceding sections of this chapter equally apply to this section.

§ 397. **Necessity for compliance with such legislation to preserve rights and property.**—There are cases which go to great lengths in holding the necessity for compliance with statutory enactments to make the terms of a treaty effectual. It has been held that, although the treaty with Mexico of 1848 provided that private rights of owners of property were to be respected, the owners of property in California who failed complied with the conditions of the act passed in 1851[1] to carry the treaty into effect, and to adjudicate the ownership of property, could not retain title to property of which they were in actual possession; but it was held that they were obliged to prove their titles in the same manner as contested titles were proved before the Commission appointed under the act, and on failure to comply with the terms of the act the property would fall into the general domain of the United States.[2] As this practically

United States was sustained in *United States* vs. *Coe*, U. S. Sup. Ct. 1894, 155 U. S. 76, FULLER, Ch. J.

Since the organization of the Court of Private Land Claims, under the statute just cited, many cases involving the validity of Spanish and Mexican titles have been decided in that court and subsequently reviewed by the Supreme Court, amongst them the following:

United States vs. *Coe*, U. S. Sup. Ct. 1898, 170 U. S. 681, MCKENNA, J.

United States vs. *Sandoval*, also *Morton* vs. *United States*, U. S. Sup. Ct. 1897, 167 U. S. 278, FULLER, Ch. J.

United States vs. *Santa Fé*, U. S. Sup. Ct. 1897, 165 U. S. 675, WHITE, J.

United States vs. *Chaves*, U. S. Sup. Ct. 1895, 159 U. S. 452, SHIRAS, J.

Rio Arriba L. & C. Co. vs. *United States*, U. S. Sup. Ct. 1897, 167 U. S. 298, FULLER, Ch. J.

[3] For a review of legislation after the acquisitions of Louisiana, Florida and Mexican Territory see opinion in *Botiller* vs. *Dominguez*, cited in note 3, § 397, p. 182, *post*.

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[1] 9 U. S. Stat. at L. p. 681.

[2] *United States* vs. *Clark*, U. S. Sup. Ct. 1834, 8 Peters, 436, MAR-

amounts to confiscation of private property unless the owner proves his title thereto exactly as permitted by the statute the author considers this case as a very extreme application of the doctrine that treaties must always be carried into effect by statutory provisions and that rights guaranteed thereby, or which ordinarily are secured by law, can only be preserved by strict compliance therewith.[3] There are other

SHALL, Ch. J. The opinion says (p. 443):

"Florida contained an immense quantity of vacant land, which the United States desired to sell. Numerous tracts, in various parts of this territory, to an amount not ascertained, had been granted by its former sovereigns, and confirmed by treaty. To avoid any conflict between these titles and those which might be acquired under the United States, it was necessary to ascertain their validity, and the location of the lands. For this purpose boards of commissioners were appointed, with extensive powers, and great progress was made in the adjustment of claims. But neither the law of nations or the faith of the United States, would justify the legislature in authorizing these boards to annul pre-existing titles, which might consequently be asserted in the courts of the country, against any ordinary grantee of the American government. The powers of the commissioners therefore were principally directed to the attainment of information, on which they might report to congress, who generally confirmed all claims on which they reported favorably. After considerable progress had been thus made in the adjustment of titles, congress, on the 26th of May, 1830, passed an act for the final settlement of land claims in Florida. This act, after confirming titles to a considerable extent, which are described in the first, second and third sections, enacts that all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, as are prescribed by the act of congress, approved 23d of May, 1823, entitled 'An act,' etc."

[3] *Botiller* vs. *Dominguez*, U. S. Sup. Ct. 1889, 130 U. S. 238, MILLER, J. *Held*, in case an act of Congress conflicts with a prior treaty the court will follow the statute. This rule was laid down in an action brought to clear certain land titles in California.

After the Mexican Treaty of 1848, the statute of March 3, 1851, was passed, which created a commission to pass upon land claims, and which provided that each and every person claiming land in California by virtue of any right or title derived from the Spanish or Mexican government should present the same to the commissioners and that all lands which should not be awarded to persons whose claims were presented and adjudicated in their favor should be condemned as a part of the public domain of the United States.

It was urged in the case at bar that a title from the Mexican government which was perfect prior to the treaty did not have to be

cases in which a more liberal interpretation was given to the construction of the treaties and the statutes which were

presented to this commission. The lower court so held. The Supreme Court reversed it and held that the statute not only applied to imperfect and merely equitable titles, but to all titles. At page 247 the court says:

"With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616; *Taylor* vs. *Morton*, 2 Curtis, 454; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195."

After reviewing the corresponding legislation after the Louisiana and Florida purchases, and the various cases in which commissions for examination of titles was sustained, the court says, on page 255:

"We are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States."

Cessna vs. *United States*, U. S. Sup. Ct. 1898, 169 U. S. 165, BREWER, J.

Held, that claims under a treaty for property must be enforced and established pursuant to the acts of Congress passed subsequent to the treaty for the purpose of determining such claims. A Mexican land grant was rejected on the ground that the grantee had not complied with the terms of the grant. The Supreme Court, however, in affirming the decision, went further and held that the claimant had not taken the proper course to prove his claim in accordance with the statutes passed after the treaty of Guadalupe-Hidalgo. After referring to the lapse of time the court says:

"But even if there were an obligation on the part of this government, either under the general rules of international law or the terms of the treaty of cession, to recognize plaintiff's claim to this particular tract, yet the time, manner and conditions of enforcing it would depend upon the will of Congress. And in creating the Court of Private Land Claims Congress has prescribed the character of claims which that court may

passed, not for the purpose of destroying, but of protecting vested rights.[4]

determine and the condition which must attach to any claim which it may enforce."

De la Croix vs. *Chamberlain*, U. S. Sup. Ct. 1827, 12 Wheaton, 599, TRIMBLE, J.

United States vs. *Rose*, U. S. Sup. Ct. 1859, 23 Howard, 262, CAMPBELL, J.

United States vs. *Roselius*, U. S. Sup. Ct. 1853, 15 Howard, 31, CATRON, J. *Same*, 15 Howard, 36, TANEY, CH. J.

Held that a court did not have jurisdiction to adjudicate as to certain grants in Louisiana on the grounds that the limitations in the acts of Congress giving the right to determine grants did not include the cases of grants affected by the actions.

Mesa vs. *United States*, U. S. Sup. Ct. 1862, 2 Black, 721, PER CURIAM.

An appeal was dismissed without opinion because it was not prosecuted in the manner directed, nor within the time limit by the act of Congress allowing appeals in land cases.

Merryman vs. *Bourne*, U. S. Sup. Ct. 1869, 9 Wallace, 592, SWAYNE, J.

Congress may destroy the operation of a treaty. *Ropes* vs. *Clinch*, U. S. Cir. Ct. S. D. N. Y. 1871, 8 Blatchf. 304, Fed. Cas. 12041, WOODRUFF, J.

[4] *United States* vs. *Moreno*, U. S. Sup. Ct. 1863, 1 Wallace, 400, SWAYNE, J.

In this case the opinion stated in regard to the effect of the cession of Mexican territory on private property on page 404: "California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe-Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice."

See also *United States* vs. *Knight*, U. S. Sup. Ct. 1861, 1 Black, 227, CLIFFORD, J.

Astiazaran vs. *Santa Rita, L. & M. Co.*, U. S. Sup. Ct. 1893, 148 U. S. 80, GRAY, J. After the Gadsden Treaty of 1853 with Mexico Congress passed the act of July 22,

§ 398. **International Law and its protection of property rights after cession of territory.**—The decisions of the Supreme Court in regard to property rights in ceded territory have frequently been based upon the accepted principles of international law especially in regard to the sanctity of titles and property. This volume is confined to the municipal law of the United States, and the application thereof to questions arising under treaties and which have been adjudicated in the courts of this country; the rules of international law, therefore, have not been discussed. When questions, however, arise as to the construction of treaties of cession and the effect thereof on the title to property, as they must be determined in courts of the United States, those courts have properly applied the rules of international law to the questions involved; in that way some of the fundamental principles of natural and international law have been incorporated

1854, and the act of July 15, 1870, providing for a method determining the validity of Mexican land grants.

This case was an action brought in the territorial court to determine the validity of the grant, and the court held that it could not entertain the action as the proceedings under the statutes had not yet been completed. The Supreme Court affirmed this decision in regard to the rights of private citizens existing before the treaty and the manner in which they should be "inviolably respected" and the right of Congress to legislate in regard thereto, the opinion says:

"By article 8 of the treaty of Gaudalupe-Hidalgo, and article 5 of the Gadsden treaty, the property of Mexicans, within the territory ceded by Mexico to the United States, was to be 'inviolably respected,' and they and their heirs and grantees were 'to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.'

"Undoubtedly, private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; and Congress might either itself discharge that duty, or delegate it to the judicial department." (Citing *De la Croix* vs. *Chamberlain*, 12 Wheat. 599, 601, 602; *Chouteau* vs. *Eckhart*, 2 How. 344, 374; *Tameling* vs. *United States, etc., Freehold Co.*, 93 U. S. 644, 661; *Botiller* vs. *Dominguez*, 130 U. S. 238.)

United States vs. *Chaves*, U. S. Sup. Ct. 1895, 159 U. S. 452, SHIRAS, J.

into the municipal law of the United States; this is especially true in regard to the ownership of property. Chief Justice Marshall declared after the cession of Louisiana that the owners of property would have been as securely protected in their property rights under the rules of justice and of international law without the provisions of the treaty as with them.[1] That the courts of the United States have recognized

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[1] *United States* vs. *Percheman*, U. S. Sup. Ct. 1833; 7 Peters, 51, (see pp. 86–87) MARSHALL, Ch. J.

"The second article (of the Treaty of 1819 with Spain ceding Florida, U. S. Treaties and Conventions, edition 1889, p. 1017) contains the cession and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

"It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowedged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. 'His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida.' A cession of territory is never understood to be a cession of property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. 'The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to

the actual existence of international law and have applied the principles thereof on many occasions appears from the cases cited under the next section.

§ 399. **International Law an element of the law of the United States.**—Many of the writers on international law devote the first chapters of their respective works to discussing the nature of those rules and principles which are binding upon the national consciences of governments and have been universally accepted by civilized nations as international law, to be respected even if there is no tribunal which has jurisdiction to enforce them.

In the United States these rules and principles have not only been recognized as existing in an ethical or moral sense, but they have been incorporated into and become a part of the law of the land to be given full consideration by the courts in determining issues before them in which those principles are involved. The Constitution expressly gives to Congress power "To define and punish Piracies and Felonies

the property and sovereignty of the said provinces, are included in this article.'

"This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words 'which are not private property,' had private property been included in the cession of the territory.

"This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by Congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words: 'All the grants of land made before the 24th of January, 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.'

"This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article."

committed on the high Seas and Offences against the Law of Nations."[1] Congress has frequently passed statutes referring claims to courts and commissions with the express provision that they be decided according to the principles of international law;[2] the Executive department of the Government has on numerous occasions invoked and followed the recognized rules of the highest branch of Jurisprudence;[3] and finally the Judicial department through the Supreme Court of the United States has solemnly declared that "international law is a part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[4]

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[1] Const. U. S. Art. I, § 8, cl. 10.

[2] Many cases have been referred by Congress to the courts with instructions to determine them according to the law of nations. Some of these have been referred to the Court of Claims and the reports of that court contain many opinions which are based upon the rules of international law as the same have been determined by the courts of the United States. In this respect see the *French Spoliation* cases cited in note to §§ 442 and 444, *post*.

See also the extract from syllabus in *United States* vs. *Repentigny*, U. S. Sup. Ct. 1866, 5 Wallace, 211, NELSON, J, quoted in note to § 395*b*, p. 167, *ante*. In this case by special act of Congress (12 U. S. Stat. at L. pp. 838, 839, approved April 19, 1860), the Repentigny heirs were referred, as the opinion says (p. 258) "to the judiciary for relief," and the act "prescribes the principles which shall govern it in hearing and adjudicating upon the case. They are: 1. The law of nations. 2. The laws of the country from which the title was derived. 3. The principles of justice. 4. The stipulations of treaties. In the light of these principles, we shall proceed to an examination of the claim;" the Supreme court decided adversely to the claimants.

The act of March 2, 1901, creating the Spanish Treaty-Claims Commissions which provides that the claims are to be adjudicated according to the merits, the principles of equity and of international law. See note to § 308, vol. 1, p. 442, for extract from Statute.

[3] It is impossible to give even a list of the numerous occasions on which the recognized authorities on international law have been quoted in communications between the Secretaries of State of the United States and the corresponding officers of foreign countries. Every number of the Foreign Relation Reports of the United States contains numerous despatches in which those authorities are cited and applied to current matters. See also extract from Wharton's Digest in next section.

[4] In *Paquette Habana*, U. S. Sup. Ct. 1900, 175 U. S. 677, GRAY, J., at p. 700, says: "For this purpose, where there is no treaty, and no con-

§ 400. **Change of sovereignty discussed in this chapter only when to, and not from, the United States.**—Change of sovereignty over any territory, when viewed from the

trolling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Hilton vs. *Guiyot*, U. S. Sup. Ct. 1895, 159 U. S. 113, GRAY, J., on p. 163, the opinion says: "International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. *Fremont* vs. *United States*, 17 How. 542, 557; *The Scotia*, 14 Wall. 170, 188; *Respublica* vs. *De Longchamps*, 1 Dall. 111, 116; *Moultrie* vs. *Hunt*, 23 N. Y. 394, 396."

It is not proposed to cite cases involving what is known as private international law, or conflict of laws, but as to the law which should be applied to maritime contracts see *Liverpool, etc., Steam Co.* vs. *Phœnix Insurance Co.*, U. S. Sup. Ct. 1889, 129 U. S. 397, GRAY, J., in which numerous cases are discussed (on pp. 443–446) and the conclusion reached is stated in the syllabus as follows:

"A decree of the Circuit Court in admiralty on the instance side, finding negligence in the stranding of a ship, can be reviewed by this court so far only as it involves the question of law.

"The owner of a general ship, carrying goods for hire on an ocean voyage, is a common carrier.

"A common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from all responsibility for loss or damage by perils of the sea, arising from negligence of the officers or crew.

"Upon a question of the effect of a stipulation exempting a com-

standpoint of international law, theoretically produces the same result in all cases, regardless of who may be the ceding, or the acquiring power. The practical results, however, may differ in a large degree. The effect of the transfer of Porto Rico from Spain to the United States will probably be very different from what the effect would have been if the United States, as the result of the Spanish war had been obliged to cede Long Island, for instance, to Spain.

As soon as territory is transferred from one power to another the sovereignty and jurisdiction of the former ceases, and that of the latter attaches; and, as Chief Justice Marshall said in the *Florida* case already referred to, the inhabitants are subject to such conditions as the new master may

mon carrier from responsibility for negligence of his servants, the courts of the United States are not bound by decisions of the courts of the State in which the contract is made.

"The general maritime law is in force in this country so far only as it has been adopted by the laws or usages thereof.

"The law of Great Britain since the Declaration of Independence is a foreign law, of which a court of the United States cannot take notice, unless it is pleaded and proved.

"The law of the place where a contract is made governs its nature, obligation and interpretation, unless it appears that the parties when entering into the contract, intended to be bound by the law of some other country.

"A contract of affreightment, made in an American port by an American shipper with an English steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, is an American contract, and governed by American law, so far as regards the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage."

Some of the other cases in which the decisions of the United States Supreme Court have been based upon the Law of Nations as the principles thereof have been determined by that court are:

Rose vs. *Himeley*, U. S. Sup. Ct. 1808, 4 Cranch, 241, MARSHALL, Ch. J.

The Nereide, U. S. Sup. Ct. 1815, 9 Cranch, 388, MARSHALL, Ch. J.

The Pizarro, U. S. Sup. Ct. 1817, 2 Wheaton, 227, STORY, J.

The Santissima Trinidad, U. S. Sup. Ct. 1822, 7 Wheaton, 283, STORY, J.

The Antelope, U. S. Sup. Ct. 1825, 10 Wheaton, 66, MARSHALL, Ch. J.

Schooner Exchange vs. *McFadden*, U. S. Sup. Ct. 1812, 7 Cranch, 116, MARSHALL, Ch. J.

And see also the cases involving rights of Indians and construction of treaties with Indians cited under § 417, notes, pp. 223 *et seq.*, *post*.

impose.[1] The sovereignty and jurisdiction of the acquiring power is necessarily exclusive and the "new master" in imposing the conditions cannot be controlled by the former sovereign, except so far as stipulations have been made in the treaty of cession itself. Even as to these there is doubt whether they are binding upon the courts in protecting inhabitants of the ceded territory if the legislature of the acquiring territory does not carry them out.

As a proposition of international law the persons residing, or owning property, in territory ceded by one power to another are not entitled to indemnity from the ceding power. International law does not allow change of sovereignty to affect private titles and property,[2] and local laws and customs remain unchanged until modified by the new sovereign.[3]

If the inhabitant, or owner of property, considers the former sovereign preferable to the new, he can so far as he is personally affected remove to other territory of the ceding power, and thus retain his original citizenship.[4] As to his property he can take his personalty with him; if his realty is affected in value by the change of sovereignty there is no legal remedy, as the transfer or relinquishment of sovereignty over territory is a political act of the sovereign and there is no *forum* in which the citizen or owner of property can maintain an action. The ceding government might indemnify owners of property in territory ceded, or over which sovereignty is relinquished, but it would be a purely voluntary act and the indemnity would have to be fixed either by the legislative power, or by such tribunal as the legislative power clothed with special jurisdiction in regard thereto.[5]

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[1] *Am. Ins. Co.* vs. *Canter*, U. S. Sup. Ct. 1828, 1 Peters, 511, MARSHALL, Ch. J.

[2] See § 395*c*, pp. 175, *et seq.*, *ante*.

[3] See § 395*a*, p p. 160, *et seq.*, *ante*.

[4] Treaties of cession have generally contained provisions as to the retention by inhabitants of ceded territory of their citizenship under the former sovereignty even though still residing in the ceded territory, on complying with certain prescribed formalities. This was the case in the recent cessions by Spain to the United States. See Treaty of 1898 in full in INSULAR CASES APPENDIX at end of Volume I.

[5] The United States indemnified the owners of property in what was known as the "disputed territory" when it relinquished sover-

The United States has always taken the position that as to the treatment of, and rights accorded to, the inhabitants of territory ceded to it, the United States must be sole judge and is entirely free from any interference by the former sovereign.

When, therefore, the United States has ceded, or relinquished sovereignty over, territory its jurisdiction has forthwith ceased and that of the new sovereign has attached; thus the inhabitants of the territory ceded are relegated to the courts of the new sovereign for protection of their rights, and those courts are bound in the same manner by their local laws and customs as the courts of the United States are bound by the laws and customs of this country.

If territory is ceded by one power to another by a treaty containing stipulations as to the treatment of the inhabitants, and the acquiring power disregards or violates such stipulations, it might be proper for the ceding power to intervene on behalf of the inhabitants suffering by reason of such violations, but that would be a high political act and would have to be asserted through the political side of the Government and the right to so intervene could not be judicially determined in the courts of either country.

Cessions of territory have been made by the United States on a few occasions, but always as the result of boundary settlements,[6] and as such have been more in the nature of relinquishment of sovereignty over, than actual cession of, the territory, although words of cession have been used.

Whether the United States has the power to cede terri-

eignty over certain territory, which had been considered as parts of Maine and other boundary states, by the Webster-Ashburton Treaty of 1842, settling the Northeastern boundary. See § 474, pp. 387, *et seq.*, *post*, and notes thereunder for details in regard to this settlement and indemnity. The indemnity that was paid was the result of congressional appropriation and not judicial determination.

[6] In the analytical indices of the various treaty volumes already referred to (U. S. Tr. and Con. 1889, and U. S. Treaties in Force, 1899) full lists of all treaties containing stipulations as to boundaries between the United States and Nations owning adjoining territory will be found. Consult also INDEX to this book and the TREATIES APPENDIX at end of this volume, in which all treaties made by United States are arranged alphabetically according to the names of the foreign countries.

tory, either belonging to the United States or to one of the States, is largely an academic question. At present there does not seem to be any prospect of its becoming a practical one. It has been discussed by many writers and reference is made to their views in a subsequent chapter.[7]

It is apparent that courts of the United States would have no jurisdiction over questions which might arise from the cession of territory by the United States to other powers or which relate to the effect of the transfer on the inhabitants of the ceded territory so far as the rights of persons and property within the ceded territory are concerned; and therefore the subject is not within the scope of this book.

The foregoing is simply the converse of the proposition that at the present time courts in Spain which formerly had jurisdiction over Porto Rico and the Philippines cannot now enforce their decrees in those Islands, and that a decision by such courts on questions arising since April 11, 1899, affecting the rights of property and persons within such territory would be a mere nullity.[8]

If the United States should ever be obliged to cede any of

[7] Art. III of the Adams-de Onis treaty of 1819 with Spain (U. S. Tr. and Con. 1889, p. 1016) after describing the then boundary line west of the Sabine river to the Pacific Ocean concludes as follows (p. 1017):

"The two high contracting parties agree to cede and renounce all their rights, claims and pretensions, to the territories described by the said line, that is to say: The United States hereby cede to His Catholic Majesty, and renounce forever, all their rights, claims, and pretensions, to the territories lying west and south of the above-described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of the said line, and for himself, his heirs, and successors, renounces all claim to the said territories forever."

By this treaty the United States renounced, or ceded, a large tract which included the whole of Texas, as well as a great deal of the Mexican territory which was ceded to the United States by the treaty of Guadalupe Hidalgo in 1848 after the Mexican War.

The Northeastern boundary was settled by the Webster-Ashburton treaty of 1842. The Northwestern boundary was settled by the Buchanan-Pakenham treaty of 1846. See TREATIES APPENDIX at end of this volume under Great Britain.

The controversy between the United States and Great Britain over the Northeastern boundary is discussed at length in §§ 474 *et seq.*, pp. 387, *et seq.*, of chapter XVI, *post*

[8] See special provisions, however,

its territory, or that of any of the States, the burning question will not be the legal power to make the cession, but the lack of physical power to retain the territory. Fortunately it will not be necessary for us to cross that river until we reach it.

in Article XII of the Treaty of 1898 with Spain, as to the judicial decrees in pending cases and for their execution by the "competent authority of the place in which the case arose." The Treaty of 1898 is printed in full in the INSULAR CASES APPENDIX at end of volume I.

ADDITIONAL CASES ON CHANGE OF SOVEREIGNTY.

Other cases involving the effect of change of sovereignty are:

Fort Leavenworth R. R. Co. vs. *Lowe*, U. S. Sup. Ct. 1885, 114 U. S. 525, FIELD, J. Effect of cession from State to United States, and extent of sovereignty transferred.

Langdeau vs. *Hanes*, U. S. Sup. Ct. 1874, 21 Wallace, 521, FIELD, J. Effect of cession on private rights. *United States* vs. *Percheman*, followed.

Kelly vs. *Harrison*, N. Y. Sup. Ct. 1800, 2 Johns. Cas. 29, KENT, J. Effect of change of sovereignty on title to real estate.

Marsh vs. *Arizona*, U. S. Sup. Ct. 1896, 164 U. S. 599, BREWER, J. Effect of cession and taxation.

Peabody vs. *United States*, U. S. Sup. Ct. 1900, 175 U. S. 546, PECKHAM, J. Appeal from Court of Private Land Claims. See § 396, p. 181, *ante*.

United States vs. *Chavez*, U. S. Sup. Ct. 1899, 175 U. S. 509, MCKENNA, J. Appeal from Court of Private Land Claims.

United States vs. *Moore*, U. S. Sup. Ct. 1851, 12 Howard, 209, CATRON, J. Louisiana land grant adjudicated.

United States vs. *Morant*, U. S. Sup. Ct. 1887, 123 U. S. 335, BRADLEY, J. Florida land grant adjudicated.

United States vs. *Morris*, U. S. Cir. Ct. Dist. Col. 1895, 23 Wash. Law Rep. 745, HAGNER, J.

United States vs. *Pena*, U. S. Sup. Ct. 1899; 175 U. S. 500, BREWER, J.

United States vs. *Pillerin*, U. S. Sup. Ct. 1851, 13 Howard, 9, TANEY, Ch. J.

United States vs. *Sibbald*, U. S. Sup. Ct. 1836, 10 Peters, 313, BALDWIN, J.

West vs. *Cochran*, U. S. Sup. Ct. 1854, 17 Howard, 403, CATRON, J.

CHAPTER XIV.

THE TREATY-MAKING POWER OF THE UNITED STATES AS IT HAS BEEN EXERCISED WITH INDIAN TRIBES.

SECTION

401—Difficulty of adhering closely to subject; opportunities to digress.

402—Necessity of referring to Indian treaties and Indian status.

403—Treaty method of dealing with Indians abolished.

404—President Washington's message in regard to making treaties with Indians.

405—Number of treaties made with Indians before method was abandoned.

406—Complications under Indian treaties gradually disappearing; the Dawes Commission.

407—General treaty law applicable to Indian treaties.

408—Chief Justice Marshall's decision in the Cherokee cases commented on.

409—Original status of Indian tribes; Chief Justice Marshall's enunciation in regard thereto in *Johnson* vs. *McIntosh*, 1823.

410—The State of Georgia and the Cherokee Nation; treaties between States and Indians.

411—*Cherokee Nation* vs. *State of Georgia*, 1831; status of Cherokee Nation in 1831.

412—*Worcester* vs. *State of Georgia*; State laws in conflict with Indian treaties; Chief Justice Marshall's decision.

SECTION

413—Same case: Chief Justice Marshall and President Jackson.

414—General rules as to effect of Indian treaties and statutes, and the construction of Indian treaties.

415—Unique status of Indian tribes, and peculiar relations between them and United States.

416—The Cherokee Nation at present; *Imperium in Imperio*; other nations.

417—Complications arising from treaty method of dealing with Indians; anomalous conditions owing to dependent relations.

418—Railroad land grants and treaty reservations.

419—Criminal jurisdiction; treaty provisions and statutes.

420—Indian citizenship; treaties and statutes; status of native inhabitants of acquired possessions.

421—Abandonment of treaty method proper course for Congress to pursue.

422—This chapter confined to treaty-making with Indians; no attempt made to review history of relations between United States and Indians, or to discuss propriety of treatment.

SECTION
423—Supreme Court has always afforded protection to Indians both as to rights of property and of person.

§ 401. **Difficulty of adhering closely to subject; opportunities to digress.**—One of the greatest difficulties that an author has to contend with, while attempting to write a book upon a single branch of a great subject, is the oft-recurring temptation to digress from the main path of discussion into those numerous cross-roads and by-ways which constantly intersect, or diverge from, the straight course which he should follow. The opportunities for rambling which have presented themselves during the preparation of this book have been numerous and enticing, but the author has conscientiously endeavored to avoid all digression from the main points under consideration, to wit: the treaty-making power of the United States, what it is, as to extent and scope, how it has been, and how it can be, exercised, and the relative effects of treaty stipulations and State and Congressional legislation.

It was the author's intention to close this volume with a few remarks upon the limitations of the treaty-making power, leaving many interesting questions in regard to the construction of treaties, the effect of treaty stipulations upon public and private rights of States and individuals, as well as numerous other interesting points which have constantly presented themselves, for consideration in their proper order in the subsequent work under contemplation, which was referred to in the Introduction, and in which he hopes to discuss those questions at length, as principal, and not as subsidiary, divisions of the "Treaty Law of the United States."[1]

§ 402. **Necessity of referring to Indian treaties and Indian status.**—It does not seem possible, however, to close this volume without making some reference to the treaty-making power, as it has been exercised by the United States Government with those aboriginal tribes of Indians which inhabited this land before the advent of the English, the Spaniards or the French, and which were far more numerous in 1787 in the States and Territories east of the Mississippi,

§ 401.
[1] See § 10 to Introduction, vol. I.

than they are to-day in the territory and reservations which have been set apart for their exclusive use westward of that great river.

§ 403. **Treaty method of dealing with Indians abolished.**—Treaty making with the Indians in some respects is no longer a subject for discussion in a practical aspect; as since 1871, pursuant to Congressional legislation then enacted, no treaties are now made with Indian tribes;[1] from 1787 until 1871, however, it was the custom of the United States Government to regulate the affairs of Indians, so far as their relations with the United States and with States were affected, by treaties, made by the Executive and rati-

§ 403.

[1] The contingent expenses of the Senate Deficiency Bill approved March 29th, 1867, 15 U. S. Stat. at L. p. 7, contained the following provision (p. 9):

"And all laws allowing the President, the Secretary of the Interior, or the Commissioner of Indian Affairs to enter into treaties with any Indian tribes are hereby repealed, and no expense shall hereafter be incurred in negotiating a treaty with any Indian tribe until an appropriation authorizing such expense shall be first made by law." Four months later this provision was repealed by an act passed specially for the purpose, July 20, 1867, 15 U. S. Stat. at L. p. 18.

The Indian Appropriation Act for the year ending June 30, 1872, approved March 3, 1871, (16 U. S. Stat. at L. p. 544) contained the following provision (p. 566):

"*Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

U. S. Rev. Stat. title XXVIII, INDIANS, chap. 2.

"*Performance of engagements between the United States and Indians. No future treaties with Indian tribes.* Sec. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired. (3 Mar., 1871, c. 120, s. 1, v. 16, p. 566. 22 June, 1874, c. 389, s. 3, v. 18, p. 176. 10 June, 1876, c. 122, v. 19, p. 58.)

"*Abrogation of treaties.* Sec. 2080. Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe, if in his opinion the same can be done consistently with

fied by the Senate, in the same manner as treaties were made and ratified with foreign countries. The fact that Congress eventually terminated this method does not necessarily reflect upon the wisdom of the earlier administrations in conducting Indian affairs through the medium of treaties, in the same manner as foreign relations were conducted. Anomalous conditions certainly resulted owing to the practice. It was unnecessary because Congress had the power to regulate commerce with the Indian tribes under express provisions in the Constitution;[2] it was also contrary to the recognized principles of international law to make treaties with any government other than those possessing full sovereign powers.[3] After the adoption of the Constitution, the Indians were, at all times, considered as wards of the nation,[4] possessing merely a right of occupancy in the soil, which in every instance belonged either to the United States, or to one of the States, and as territory was subject to the jurisdiction, of one or the other or both, as the case might be.[5] It is not strange, therefore, that difficulties arose from the treaty method as it was pursued, and that it was finally terminated, after experience had demonstrated that it was impracticable and improper to treat with Indian nations or tribes which were wholly under the control of our own government, in the same manner as we treated with independent and sovereign foreign powers over whose territory and citizens the United States have no control whatsoever.

§ 404. **President Washington's message in regard to making treaties with Indians.**—The custom of making treaties with the Indian tribes through the Executive and ratifying them by the Senate was inaugurated by President

good faith and legal and national obligations."

[2] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Const. U. S. Art I, § 8, cl. 3.

[3] See Chap. IV, especially § 133, vol. I, pp. 232, *et seq.*

[4] *United States* vs. *Kagama*, U. S. Sup. Ct. 1886, 118 U. S. 375, MILLER, J. "These Indian tribes *are* the Wards of the Nation. They are communities *dependent* on the United States." And see extract from opinion in this case in note to § 419, pp. 226, *et seq.*, *post.*

[5] See cases under § 409, p. 204, *post.*

Washington; on September 17, 1789, within a few months after his inauguration, he transmitted a message to the Senate in which he asked whether or not treaties with Indians should be ratified in the same manner as those with foreign nations; the answer was evidently in the affirmative, for from that time until 1871, it became the settled practice to negotiate, and ratify, treaties with the Indians in the same manner as treaties with foreign nations; as the message of President Washington is brief, and was the basis of the procedure in regard to treaties with the Indians, which continued for over three-quarters of a century, it is included at length in the notes to this section.[1]

§ 404.

[1] Special message (pp. 61–62, vol. 1, Richardson's Messages).

"September 17, 1789.

"*Gentlemen of the Senate:*

"It doubtless is important that all treaties and compacts formed by the United States with other nations, whether civilized or not, should be made with caution and executed with fidelity.

"It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers as final and conclusive until ratified by the sovereign or Government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for though such treaties, being on their part made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation until approved and ratified by the Government. It strikes me that this point should be well considered and settled, so that our national proceedings in this respect may become uniform and be directed by fixed and stable principles.

"The treaties with certain Indian nations, which were laid before you with my message of the 25th May last, suggested two questions to my mind, viz: First, whether those treaties were to be considered as perfected and consequently as obligatory without being ratified. If not, then secondly, whether both or either, and which, of them ought to be ratified. On these questions I request your opinion and advice.

"You have, indeed, advised me '*to execute and enjoin an observance of*' the treaty with the Wyandottes, etc. You, gentlemen, doubtless intended to be clear and explicit, and yet, without further explanation, I fear I may misunderstand your meaning, for if by my *executing* that treaty you mean that I should make it (in a more par-

§ 405. **Number of treaties made with Indians before method was abandoned.**—Over three hundred treaties were made with Indians during the eighty years that the practice continued, a full list of which will be found in the document published by the Interior Department in 1873:[1] many of

ticular and immediate manner than it now is) the act of Government, then it follows that I am to ratify it. If you mean by my *executing it* that I am to see that it be carried into effect and operation, then I am led to conclude either that you consider it as being perfect and obligatory in its present state, and, therefore to be executed and observed, or that you consider it as to derive its completion and obligation from the silent approbation and ratification which my proclamation may be construed to imply. Although I am inclined to think that the latter is your intention, yet is certainly is best that all doubts respecting it be removed.

"Permit me to observe that it will be proper for me to be informed of your sentiments relative to the treaty with the Six Nations previous to the departure of the governor of the Western territory, and therefore I recommend it to your early consideration.

"GO. WASHINGTON."

§ 405.

[1] A compilation of all the treaties between the United States and the Indian tribes now in force as laws, prepared under the provisions of the act of Congress, approved March 3, 1873, entitled "An act to provide for the preparation and presentation to Congress of the revision of the laws of the United States, consolidating the laws relat- to the post-roads, and a code relating to military offenses, and the revision of treaties with the Indian tribes now in force." Washington, Government Printing Office, 1873.

See also various collections of Indian laws and treaties at different dates or referring to particular tribes and the following compilations made prior to 1873.

Indian treaties, and laws and regulations relating to Indian affairs, to which is added an appendix, containing the proceedings of the old Congress, and other important state papers, in relation to Indian affairs. Compiled and published under orders of the Department of War of 9th of February and 6th of October, 1825, Washington City: Way & Gideon, Printers, 1826.

The Public Statutes at Large of the United States of America, from the organization of the government in 1789, to March 3, 1845. By authority of Congress. Arranged in chronological order with references to the matter of each act and to the subsequent acts on the same subject, and copious notes of the decisions of the Courts of the United States construing those acts, and upon the subjects of the laws. With an index to the contents of each volume, and a full general index to the whole work, in the concluding volume, together with the Declaration of Independence, the Articles of Confederation and the Constitution of the United States; and also, tables, in the last volume, containing lists of the acts relating to the judiciary, imposts

these treaties have expired either by complete extinction of the tribe with which they were made, the merger of that tribe into some other tribe, the superseding effects of subsequent treaties, or by abrogation, either as the result of subsequent acts of Congress or by consent of the contracting parties. Although no further treaties can be made with any of the Indian tribes, (unless the act of Congress prohibiting them should be repealed and the practice reverted to, which is not likely to happen) many of these treaties still remain in force and questions may still arise, as many have arisen since 1871, in regard to the proper construction of such existing treaties, or of the effect of subsequent acts of Congress thereon. It is therefore proper, in a treatise of this nature, to refer to the treaty-making power as it has been exercised with Indian tribes so far as the question of power is concerned, and in so far as there are any similarities or distinctions in that respect between treaties made with Indians and those made with foreign nations. It is intended to refer to only a few of the numerous decisions, statutes and treaties, affecting Indian tribes, the references being confined exclusively to those bearing on the broad points discussed in the text; cases are also cited in many instances, as to their bearing upon those general principles which are applicable alike to treaties with Indians and with foreign powers.

§ 406. **Complications under Indian treaties gradually disappearing; the Dawes Commission.**—It is a matter of congratulation that all cause for these questions arising is rapidly

and tonnage, the public lands, etc. Edited by Richard Peters, Esq., counsellor at law. The rights and interest of the United States in the stereotype plates from which this work is printed are hereby recognized, acknowledged and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845. Boston, Little, Brown and Company, 1861. Volume VII: Treaties between the United States and the Indian tribes.

For other subsequent Indian treaties (1842), see the "United States Statutes at Large" volumes 9 to 19 inclusive.

A synoptical Index to the laws and treaties of the United States of America, from March 4, 1789, to March 3, 1851, with references to the edition of the laws, published by Bioren and Duane, and to the Statutes at Large, published by Little and Brown, under the authority of Congress. Prepared under the direction of the Secretary of Senate. Boston, Charles C. Little and James Brown, 1852.

disappearing. Through the medium of the Commission appointed by the act of Congress and which is generally known as the "Dawes Commission," taking its name from its Chairman, the relations between many of the Indian tribes and the United States both in regard to the administration of their affairs, and their possession of the soil, will be so definitely determined and established that questions hereafter arising can be settled, not by weighing conflicting clauses of statutes and treaties, but pursuant to a well digested and codified scheme of legislative and tribal control, and of judicial procedure of the Courts of the tribes and of the United States.[1]

This effort on the part of the Government to properly adjust Indian titles was contested, but the statute appointing the Commission has been upheld by the Supreme Court as being within the constitutional powers of Congress.[2]

§ 406.

[1] A Commission was appointed under an act of Congress approved March 3, 1893, which provides for the appointment of this commission to the five civilized tribes (Cherokee, Choctaw, Chickasaw, Muscogee or Creek, and Seminole Nations). The object stated is "for the purpose of the extinguishment of the national or tribal title to any lands within that territory (Indian Territory) now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the land within said Indian territory." Indian Appropriation Act for fiscal year ending June 30th, 1894, 27 U. S. Stat. at L. p. 612, see § 16, p. 645. Other acts have been passed since extending the powers of the commission and several reports have been made of the progress of the work. See part II, Indian Affairs, Annual Report of the Department of the Interior for 1899, Government Printing Office, for a report of 750 pages (with maps, schedules and illustrations) made by Henry L. Dawes (Mass.) chairman, Tams Bixby (Minn.), Archibald S. McKennon (Ark.) and Thomas B. Needles (Illinois) composing the commission. This report contains all the statutes under which the commissioners hold their powers.

[2] *Stephens* vs. *Cherokee Nation*, U. S. Sup. Ct. 1899, 174 U. S. 445, FULLER, Ch. J. In this case which involved the constitutionality, or the validity, of legislation affecting citizenship or allotment of lands

§ 407. **General treaty law applicable to Indian treaties.**—In discussing the treaty-making power in general in the preceding chapters, decisions in cases involving Indian treaties have frequently been cited as authority for rules of law applicable to the general treaty-making power and having the same force as, and being equal in authority with, decisions involving treaties with foreign nations. Chief Justice Marshall, in the *Cherokee Nation* cases,[1] took the position, which has practically been adhered to ever since by the Supreme Court, that certain general rules were equally applicable to treaties made with Indians or with foreign powers. So far, therefore, as the elementary rules as to the exercise of the power, and the relative effects of treaties and statutes, and, to some extent, the construction of treaty clauses, there can be no doubt that many of the principles enunciated in cases involving Indian treaties are the same as though the treaties had been made with foreign powers.

§ 408. **Chief Justice Marshall's decision in the Cherokee cases commented on.**—Chief Justice Marshall's decision in declaring that Indian tribes stood upon a plane with foreign powers so far as treaties and treaty relations of the United States are concerned has, however, been the subject of comment, and his decisions and opinions in regard to the Cher-

in the Indian Territory; *held* that the legislation appointing the Dawes Commission was constitutional. From pages 484 to 488 the court discusses many decisions affecting treaty relations of the United States and the Indians, and in concluding the opinion refers to the decision in the Territorial Court below, saying as follows (pp. 491, 492):

"The elaborate opinions of the United States court in the Indian Territory by SPRINGER, J., CLAYTON, J., and TOWNSEND, J., contained in these records, some of which are to be found in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and set forth the various treaties, tribal constitutions and laws, and the action of many tribal courts, commissions and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

"As we hold the entire legislation constitutional, the result is that all the judgments must be affirmed."

(There were there three other cases argued and decided simultaneously.)

§ 407.

[1] For these cases see §§ 411–412, p. 209, *et seq.*, *post.*

okee nation have been modified by subsequent decisions of the Supreme Court;[1] in the earlier history of this country Indian tribes played a far more important part, and occupied a much higher position, relatively, than they do at the present time. The then existing conditions, which have now passed into history and can never exist again, at least so far as the North American continent is concerned, made the practical settlement of questions involving Indian tribes and their relations to the government a far more difficult problem than can be appreciated by those who simply study them now from historical and legal standpoints.[2]

It is beyond the scope of this volume to enter into a general discussion of the status of the North American Indians in the United States, but a few cases in which that status has been definitely determined by the Supreme Court of the United States will be referred to in the succeeding sections.

§ 409. **Original status of Indian Tribes; Chief Justice Marshall's enunciation in regard thereto in Johnson vs. McIntosh, 1823.**—It can readily be seen that the status of the Indian tribes became at a very early day a question of great importance. If their title to the soil were absolute and they could exclude all other nations from occupying it or in any way interfering with their possession, it would have prevented the development of this country and necessitated its remaining a vast hunting ground for a few hundred thousand aborigines.[1] Chief Justice Marshall[2] declared in 1823 that the principles of discovery and occupation as the

§ 408.

[1] *Holden* vs. *Joy*, U. S. Sup. Ct. 1872, 17 Wall. 211, CLIFFORD, J.; and see extract from opinion in note to § 414, p. 215, *post*.

[2] See Roosevelt's Winning of the West, vol. 1, chaps. I–IV, for a statement as to the condition of the Indians in the original States.

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[1] Roosevelt and Parkman both place the total under half a million.

[2] *Johnson* vs. *McIntosh*, U. S. Sup. Ct. 1823, 8 Wheat. 543, MARSHALL, CH. J. As this is one of the leading Indian title cases, an extended reference will be made to it. The point decided in the syllabus is stated very briefly as follows:

"A title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773, and 1775, cannot be recognized in the courts of the United States."

The opinion of the Chief Justice (pp. 571–605), is a lengthy resumé of the relations between the European nations and the Indians and the ownership of the United States and

same were recognized by international law had been exercised by Great Britain, France and Spain, and that the United

the several States of the territory included within their respective boundaries.

On p. 584, the Chief Justice expresses the principle adopted by the European nations as follows:

"Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?"

In answer to this question the Chief Justice says (pp. 584–587):

"By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

"Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her 'exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth.' The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

"Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

"In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, for the sale of that country which now constitutes Kentucky, a country every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

"The States, having within their

States had succeeded to all their rights within the territory over which this Government exercised jurisdiction, and

chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation,' etc., 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.'

"The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

"After these States became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

"The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

"Our late acquisitions from Spain (Florida) are of the same character; and the negotiations which preceded those acquisitions, recognize and elucidate the principle which has been received as the foundation of all European title in America.

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."

This extract from the opinion expresses the view of the Supreme Court, but it is necessary to read the entire opinion in order to obtain a clear idea of the principles which were established by the decision in this case.

Beecher vs. *Wetherby*, U. S. Sup. Ct. 1877, 95 U. S. 517, FIELD, J. The doctrine announced in *Johnson* vs. *McIntosh* was reiterated by Mr. Justice Field.

that the Indians possessed only a right of occupancy which was subject to the governmental control of the United States.

The principles enunciated in this case have frequently been followed in later decisions of the Federal Courts.[3]

§ 410. **The State of Georgia and the Cherokee Nation; treaties between States and Indians.**—The principal difference between the Indian tribes and foreign powers which was recognized before the *Cherokee Nation* cases were de-

Jackson vs. *Porter*, U. S. Cir. Ct. N. Y. 1825, 1 Paine, 457, THOMPSON, J. *Held* that the title of an individual to a tract of land under a grant made by Indians prior to the British Treaty of Peace was void. The status of Indians and the effect of a deed given by them was examined at length and the principles of *Johnson* vs. *McIntosh*, were followed.

[3] *Mitchel* vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 711, BALDWIN, J. U. S. Sup. Ct. 1841, 15 Peters, 52, WAYNE, J.

The status and rights of Indians and of persons dealing with them under treaties and contracts executed prior to the cession of Florida to the United States discussed, at length.

Robinson vs. *Caldwell*, U. S. Cir. Ct. App. 9 Cir. 1895, 29 U. S. App. 468, GILBERT, J.

"The absolute title to all lands in the Indian country is vested in the United States, subject only to the Indian right of possession, which the government has the absolute right to extinguish."

The effect of the treaties with Great Britain and the Nez Perce Indians in regard to the disputed territory west of the Rocky Mountains discussed.

Bates vs. *Clark*, U. S. Sup. Ct. 1877, 95 U. S. 204, MILLER, J. "In the absence of any different provision by treaty or by Act of Congress, all the country described by the first section of the Act of June 30, 1834 (4 Stat. 729), as Indian country; remains such only as long as the Indians retain their title to the soil."

Seneca Nation vs. *Christie*, N. Y. Ct. App. 1891, 126 N. Y. 122, ANDREWS, J. (and see reference to this case § 347 of ch. XI; affirming same case 49 Hun. 524, BRADLEY, J.) Writ of error to the Supreme Court dismissed 1896, 162 U. S. 283, FULLER, Ch. J. A full history is given in these opinions of the relations of the Seneca Indians with New York, Massachusetts and the United States. The principles laid down in *Johnson* vs. *McIntosh* as to title followed, and the relations of the colonies and States with the Indians also discussed.

Fellows vs. *Blacksmith*, U. S. Sup. Ct. 1856, 19 How. 366, NELSON, J., affi'g *Blacksmith* vs. *Fellows*, N. Y. Ct. of Appeals, 1852, 7 N. Y. 401, EDMONDS, J.

Marsh vs. *Brooks*, U. S. Sup. Ct., 1850, 8 Howard, 223, and 1852, 14 Howard, 513, CATRON, J.

Choctaw and Chickasaw Nations vs. *United States*, U. S. Ct. Claims, 1899, 34 Ct. Claims, 17, HOWRY, J.

United States vs. *Cook*, U. S. Sup. Ct. 1873, 19 Wall. 591, WAITE, CH. J.

Jackson vs. *Porter*, U. S. C. C. Dist. N. Y. 1825, 1 Paine, 457, THOMPSON, J.

cided, was that the United States *owned* the land which the Indian tribes occupied, thus exercising jurisdiction over it and the inhabitants, while there is no jurisdiction of any kind over any of the territory or inhabitants of foreign powers.

When, however, controversies arose between the Cherokee Nation and the State of Georgia because the State attempted to enforce its State laws as to lands wholly within its own boundaries, but also within the territory over which the Cherokee Nation claimed exclusive jurisdiction pursuant to treaty stipulations, direct questions were raised as to the extent of the treaty-making power of the United States, and how far treaty stipulations made with Indian tribes were paramount to State legislation.[1]

The history of this controversy, which the Supreme Court was called upon to adjudicate during the administration of President Jackson is long and interesting; a full account of it will be found in Von Holst's Constitutional History,[2] as well as in other detailed histories of the United States; President Jackson sympathized with the position taken by the State; and as Chief Justice Marshall took exactly the opposite view and expressed it very emphatically, personal feelings undoubtedly existed, which, while they did not affect the decision, were probably involved in the consideration of the questions which were submitted to the court, and in the action taken thereafter by the Executive Department of the Government.[3]

It is another strange fact that although the States of the Union could not exercise any treaty-making power with foreign states, or enter into compacts with each other, some of them did enter into treaties with Indian tribes within their own borders. The occasions were too few to establish legal precedents of importance as they are interesting, however, from an historical point of view some of them are referred to in the notes. The United States appears to have assented to these peculiar transactions.[4]

§ 410.

[1] These cases are discussed at length under the next two sections.

[2] Chap. XI, vol. I.

[3] See note 1 under § 413, p. 211, *post.*

[4] Treaty between State of New York and the Mohawk Indians made March 29, 1797, with the sanction of the United States of America. 7 U. S. Stat. at L. p. 61.

Articles of agreement between

§ 411. **Cherokee Nation vs. State of Georgia, 1831; status of Cherokee Nation in 1831.**—The first point that was raised in the controversy was whether or not the Cherokees constituted a foreign State in the sense of that term as used in the Constitution.[1] It was admitted that the tribes did not form a State of the Union, and the opinion declared the condition of the Indians, in their relation to the United States, to be, perhaps, unlike that of any other people in existence; in general, nations not owing a common allegiance are foreign to each other, and the term of foreign nation is strictly applicable by either to the other; the relations of the Indians to the United States are marked by peculiar and cardinal distinctions which exist nowhere else. After reiterating the doctrine of occupation, practically as he had already announced it in *Johnson* vs. *McIntosh*,[2] the Chief Justice declared that they can, perhaps, be denominated as domestic, dependent nations, occupying territory to which the United States asserts a title independent of their will, which must take effect in point of possession when their possession ceases; meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. After a further consideration of the subject, the opinion of the Court was that an Indian tribe or nation within the United States was not a foreign State in the sense of the Constitution, and could not, therefore, maintain an action in the Courts of the United States against one of the States.

The question before the Court was solely that of jurisdiction and whether the Cherokee Nation could bring an action against the State of Georgia in the Federal Courts on questions based on State legislation in contravention of a treaty

the State of Georgia and the Creek Nation, January 8, 1821. 7 U. S. Stat. at L. p. 217.

Treaties between the Seneca and Tuscarora Indians and Thomas Ludlow Ogden and Joseph Fellows, made under the authority of the United States, January 15, 1838, for the sale of lands. 7 U. S. Stat. at L. p. 557, and p. 559.

§ 411.

[1] The *Cherokee Nation* vs. *State of Georgia*, U. S. Sup. Ct. 1831, 5 Peters, 1, MARSHALL, Ch. J.

As to the present status of the Cherokee Nation see *Cherokee Nation* vs. *Southern Kansas Railway Co.*, U. S. Sup. Ct., 1890, 135 U. S. 641, HARLAN, J., and other cases in notes under § 416, p., 220, *post.*

[2] 8 Wheaton, 543; for extracts from opinion see note under § 409, pp. 204, *et seq.*, *ante.*

which had been formally executed by the President of the United States and ratified by the Senate, and under which the Cherokees had certain definite rights guaranteed to them as to territory wholly within the State of Georgia. The Court decided that it had no jurisdiction of the case as it had been presented; the following year, however, a case involving the rights of an individual was brought before the Court, of which it did take jurisdiction, and the same questions as to State and Federal power were once more raised, discussed, and this time they were decided upon the main issues.[3]

§ 412. **Worcester vs. State of Georgia; State laws in conflict with Indian treaties; Chief Justice Marshall's decision.** —Under certain Cherokee treaties made prior to 1830, the exclusive jurisdiction over certain territory wholly within the State of Georgia was guaranteed to the Cherokees. Laws were passed by the State of Georgia requiring, and providing for, licenses to enter and occupy the territory; one Worcester, a missionary, was arrested for entering the territory and living therein, in violation of these State laws; he was arrested, tried and convicted by a State Court; he pleaded that he had entered the territory by the authority of the nation which had been exercised pursuant to treaty stipulations, and that the State law under which he was arrested was absolutely void as it was in contravention of some of the guarantees of the treaty.[1]

The case was argued on a writ of error; all the questions which were raised in *Johnson* vs. *McIntosh*[2] and the *Cherokee Nation* vs. *Georgia*[3] were again presented and reargued before the Supreme Court; Chief Justice Marshall delivered the opinion. He held that the Supreme Court had jurisdiction, as the validity of a statute of the State of Georgia was drawn in question on the ground that it was repugnant to the Constitution, treaties and laws of the United States, and as the

[3] See next section.

§ 412.

[1] *Worcester* vs. *State of Georgia*, U. S. Sup. Ct. 1832, 6 Peters, 515. MARSHALL, Ch. J; for a list of the laws and treaties involved in this action, see the opinion at p. 537.

[2] *Johnson* vs. *McIntosh*, U. S. Sup. Ct. 1823, 8 Wheaton, 543, MARSHALL, Ch. J.

[3] *The Cherokee Nation* vs. *State of Georgia*, U. S. Sup. Ct. 1831, 5 Peters, 1, MARSHALL, Ch. J.

For extracts from opinions of these cases, see preceding sections and notes.

decision of the State Court had been in favor of its validity the Supreme Court could review it; that the Indian Nations were distinct, independent political communities, retaining their original, natural rights as the undisputed possessors of the soil from time immemorial; that the term "nation" as generally applied to them meant a people distinct from others; further that the Constitution by declaring treaties already made, as well as those to be made, the supreme law of the land, had adopted and sanctioned the provisions of the treaties with the Indian nations and consequently admitted their rank among those powers which were capable of making treaties; the final adjudication as expressed in the syllabus on that point is as follows: "The words 'treaty' and 'nation' are words of our own language selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to the Indians as we have applied them to other nations of the earth; they are applied to all in the same sense."

§ 413. **Same case; Chief Justice Marshall and President Jackson.**—In regard to the relative effects of a treaty of the United States and a State statute, Chief Justice Marshall held that acts of the legislature of Georgia were void because they interfered forcibly with the relations established between the United States and the Cherokee Nation, the regulations of which, according to certain parts of our Constitution, were committed exclusively to the Government of the United States; and also because they were in direct hostility with the treaties, and in equal hostility with the acts regulating intercourse and giving effect to the treaties; the indictment thereunder was held to be null and of no effect and the court made a decree that the plaintiff was entitled to his writ of error and should be discharged from imprisonment. No effort was made on the part of the Executive department of the Government to enforce this decree, as President Jackson sympathized with the State officials of Georgia.[1]

§ 413.

[1] It is said that when President Jackson was told of this decision, he said: "Well, John Marshall has made his decision, now let him enforce it;" when the mandate of the Supreme Court was issued, no effort was made by the executive department of the government to enforce it; Worcester was event-

§ 414. **General rules as to effect of Indian treaties and statutes, and the construction of Indian treaties.**—It is not necessary to quote further from the opinion in this case; the principles established by it have been followed by the Court, and, notwithstanding the fact that treaties are no longer made with Indians, the general rules promulgated in in this case, but which have been enlarged by decisions in other cases, a few of which are cited in the notes,[1] can be stated as follows:

First. So long as the practice of making treaties with the Indians was continued, the treaties became, when ratified by the Senate, the supreme law of the United States in the same manner as treaties with foreign powers became the supreme law, and treaties were made and ratified practically as were treaties with foreign powers.[2]

Second. That treaties made with Indian tribes, and statutes enacted by Congress in pursuance thereof to make

ually released, but not until over a year had elapsed after the Supreme Court of the United States had declared that the state law under which he was imprisoned was void and that he was entitled to his freedom. See Von Holst's Constitutional History of the United States, vol. I, p. 458, note.

§ 414.

[1] A few cases only are cited under this section, as it is intended to cover the subject in a very superficial manner. The digests should be referred to for the numerous cases affecting the construction of Indian treaties.

[2] The *Cherokee Nation* cases; see §§ 410–412, *ante; The Cherokee Tobacco*, U. S. Sup. Ct. 1870, 11 Wall. 616, SWAYNE, J.

United States vs. *43 Galls. of Whiskey*, U. S. Sup. Ct. 1876, 93 U. S. 188, DAVIS, J. Same case, 1883, 108 U. S. 491, FIELD, J.

Fellows vs. *Blacksmith*, U. S. Sup. Ct. 1856, 19 Howard, 366, NELSON, J., affirming *Blacksmith* vs. *Fellows*, N. Y. Ct. of App. 1852, 7 N. Y. 401, EDMONDS, J.

Negotiations with Indians and the effect of Indian treaties and the right of the Indians to make treaties is discussed in the opinion at length.

Brown vs. *United States*, U. S. Ct. Claims, 1897, 32 Ct. Claims Reps. 432, NOTT, J.

United States vs. *La Chappelle*, U. S. Cir. Ct. Washington, 1897, 81 Fed. Rep. 152, HANDFORD, J.

In this case an Indian agreement was held invalid on the ground that the alleged treaty was made by the chief, but that his tribe had refused to ratify it, and that therefore the land assumed to be ceded by the treaty had never become a part of the public domain of the United States.

See also cases in Court of Claims cited in notes to § 417, pp. 223, *et seq.*, *post.*

the treaties effectual, are paramount and superior to the laws of any State which conflicted therewith, in the same manner as treaties and laws in pursuance thereof with foreign powers are superior to State laws,[3] and that during the exist-

[3] *Bell's Gap Railroad Co.* vs. *Pennsylvania*, U. S. Sup. Ct. 1889, 134 U. S. 232, BRADLEY, J., affirmed as to the point that a provision in a State law for the assessment of a State tax upon the face value of bonds instead of their nominal value violates no provision of the Constitution of the United States.

Brown vs. *Brown*, Sup. Ct. N. C., 1890, 106 N. C., 451, DAVIS, J.

It was decided in this case how far a State may settle the boundary lines within their own limits or reservations under United States and Indian treaties. The particular line in this case is known as the Holston Treaty Line and is referred to in many Indian treaties affecting land in Georgia and the Carolinas.

Buffalo P. & R. Co. vs. *Lavery*, Y. Y. Sup. Ct., 5 Department, 1894, 75 Hun. 396, BRADLEY, J. As stated in the syllabus; "It is not within the legislative power of the State of New York to empower Indian nations to make, or others to take from them, grants or leases of lands within Indian reservations.

"It is only pursuant to the Federal authority that lands belonging to an Indian reservation can be granted or demised or acquired by conveyance or lease from an Indian nation." And that a law of the State of New York authorizing railroad companies to contract with Indians for the right to construct railroads over their lands is not within the legislative power of the state.

Cutler vs. *Dibble*, U. S. Sup. Ct. 1858, 21 Howard, 366, GRIER, J., affirming s. c., N. Y. Ct. of App. 1857, 16 N. Y. 203, BROWN, J., also cited as *State of New York* vs. *Dibble*.

A state statute preventing intrusions on Indian lands was held not to be in violation of the Constitution of the United States or the treaties between the United States and the Seneca Indians.

Danforth vs. *Thomas*, U. S. Sup. Ct. 1816, 1 Wheaton, 155, TODD, J.

Love vs. *Pamplin*, U. S. Cir. Ct. Tenn, 1884, 21 Fed. Rep. 755, MATTHEWS, J.

Lowry vs. *Weaver*, U. S. Cir. Ct. Ind. 1846, 4 McLean, 82.

Held that Indians living in a state and doing business as merchants are responsible by the laws of the state for the payment of their debts, notwithstanding treaty reservations, and that lands reserved to them under a treaty may, under some circumstances, be made responsible for the payment of their debts notwithstanding such stipulations.

The New York Indians, U. S. Sup. Ct. 1866, 5 Wallace, 761, NELSON, J. The statute of a state authorizing the sale of lands for taxes laid by a State is void if it in any way conflicts with an Indian treaty, and that a sale under such tax is void so far as it affects the rights of the Indians to occupy the lands. Also the right of Indians to sell their lands discussed.

Patterson vs. *Jenks*, U. S. Sup. Ct. 1829, 2 Peters, 216, MARSHALL, Ch. J.

ence of the treaty all State legislation contravening such treaties is void[4] unless enacted after statutes of the United States had nullified or modified the treaty.[5]

Third. That the rules applicable to the relative effect of treaties and statutes as they are generally stated in the preceding chapters are applicable alike to treaties with foreign powers and to treaties with Indians.[6]

Peck vs. *Miami County Commissioners*, U. S. Cir. Ct. Kans. 1876, 4 Dillon, 370, Fed. Cas. 10891, DILLON, J. *Held* that if an Indian had parted with his lands they were subject to State taxation.

Pennock vs. *Franklin County Commissioners*, U. S. Sup. Ct. 1888, 103 U. S. 44, FIELD, J. Distinguishing the *Kansas Indian* case.

Preston vs. *Browder*, U. S. Sup. Ct., 1816, 1 Wheaton, 115, TODD, J.

State ex rel. Tompton vs. *Donoyer*, Sup. Ct. N. Dak. 1897, 6 N. Dak. Rep. 586, BARTHOLOMEW, J.

Stevens vs. *Thatcher*, Sup. Ct. Me. 1897, 91 Maine, 70, EMERY, J. In an action involving treaty rights of Indians on White Squaw Island in the Penobscot, Maine, it was claimed that provisions in the treaties debarred the legislature from including any of the Penobscot islands above Old Town within any incorporated town; it was held that this could not be sustained.

Wagoner vs. *Evans*, U. S. Sup. Ct. 1898, 170 U. S. 588, SHIRAS, J. Power of Territory of Oklahoma to tax cattle grazing on Indian Territory sustained.

Wau-pe-man-qua vs. *Aldrich*, U. S. Cir. Ct. Indiana, 1886, 28 Fed. Rep. 489, WOODS, J.

[4] Cases should all be examined carefully to see in what cases, and under what circumstances State laws have been sustained.

[5] *Ward* vs. *Race Horse*, U. S. Sup. Ct. 1896, 163 U. S. 504, WHITE, J.

See extracts under § 379, p. 87, and § 386, p. 132, *ante*.

[6] *Eastern Band of Cherokees* vs. *United States*, U. S. Ct. Claims, 1885, 20 Ct. Claims, 449, RICHARDSON, Ch. J. (Affirmed *sub nom. Cherokee Trust Funds*, U. S. Sup. Ct., 1885, 117 U. S. 288, FIELD, J.) Article 8 of the syllabus is as follows:

"The Cherokee Nation, as litigants, have a right to stand upon their treaties in relation to the funds in suit and neither an Act of Congress nor the proceedings of the political departments of the government can take away their vested rights guaranteed by treaty."

See also cases under § 418, p. 225, *post*, involving land grants to railroads and Indian treaties.

Eells vs. *Ross*, U. S. Cir. Ct. App. 9 Cir. 1894, 64 Fed. Rep. 417, MCKENNA, J.

Lattimer vs. *Poteet*, U. S. Sup. Ct. 1840, 14 Peters, 4, MCLEAN, J. See extract from opinion in notes to § 473, *post*.

United States vs. *Carpenter*, U. S. Sup. Ct. 1884, 111 U. S. 347, FIELD, J. A land patent was declared void under the rights of the Indians acquired under the Sioux treaty of 1859.

United States vs. *Hunter*, U. S. Cir. Ct. Mo., 1884, 21 Fed. Rep. 615, BREWER, J.

United States vs. *Le Bris*, U. S. Sup. Ct., 1887, 121 U. S. 278. WAITE, Ch. J.

Fourth. That while the treaty-making power so long as it was exercised with Indians was in many respects similar to the power as exercised with foreign nations, the rules applicable to the *construction* of treaties with Indians are in some respects different from those applicable to treaties with foreign powers, because of that superiority of the United States Government to the Indian tribes, which does not exist as to any foreign powers, must necessarily be taken into consideration, and the fact that the relationship of the Indians to the United States is that of ward and guardian must be considered as an element of vital importance in the construction of treaty stipulations.[7]

[7] One of the latest utterances of the Supreme Court on the construction of Indian treaties was delivered in 1899 in a case involving the meaning of a clause reserving certain sections for the chief of the tribe with which the treaty was made. The syllabus states: "A treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* vs. *Meehan*, U. S. Sup. Ct. 1899, 175 U. S. 1, GRAY, J.

Holden vs. *Joy*, U. S. Sup. Ct. 1872, 17 Wall. 211, CLIFFORD, J.

This is a long and complicated case involving the construction of numerous treaties and statutes made with and affecting the lands of the Cherokee Indians.

The general law in regard to treaties between the United States and the Indians and the right to make the same is referred to at page 242, as follows:

"Valid treaties were made by the President and Senate during that period with the Cherokee nation, as appears by the decision of this court in several cases. *U. S.* vs. *Rogers*, 4 Howard, 567. Indeed, treaties have been made by the United States with the Indian tribes ever since the Union was formed, of which numerous examples are to be found in the seventh volume of the public statutes. *Cherokee Nation* vs. *Georgia*, 5 Peters, 17; *Worcester* vs. *Georgia*, 6 Id. 543. Indian tribes are States, in a certain sense, though not foreign States or States of the United States within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects. They are not States within the meaning of any one of those clauses of the Constitution, and yet in a certain domestic sense, and for certain municipal purposes, they are States, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being

§ 415. Unique status of Indian tribes, and peculiar relations between them and United States.—Briefly stated,

responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts. *Doe* vs. *Braden*, 16 Howard, 635; *Fellows* vs. *Blacksmith*, 19 Id. 372; *Garcia* vs. *Lee*, 12 Peters, 519.

"Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur, and inasmuch as the power is given, in general terms, without a description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States. *Holmes* vs. *Jennison et al.*, 14 Peters, 569; 1 Kent, 166; 2 Story on the Constitution, sec. 1508; 7 Hamilton's Works, 501; Duer's Jurisprudence, 229."

United States vs. *Flournoy, etc., Co.*, U. S. Cir. Ct. Neb. 1896, 71 Fed. Rep. 576, SHIRAS, J.

This is the same case as reported under title of *Flournoy, etc., Co.* vs. *Beck*, Beck being the United States land agent; and of *Beck* vs. *Real Estate Co.*, U. S. Cir. Ct. App. 8th Cir. 1894, 65 Fed. Rep. 30, THAYER, J.

In this case it was held that when Indians were made citizens it did not necessarily remove the limitations of alienation which had been imposed by treaty and statute.

In regard to the court taking judicial notice of treaties with Indians the opinion says (p. 578):

"The courts of the United States take judicial notice not only of the public acts of congress and of the legislatures of the several states of the union, but also of the rules and regulations prescribed by the several departments for the transaction of the public business (*Caha* vs. *U. S.*, 152 U. S. 211, 14 Sup. Ct. 513); also of the territorial extent of the jurisdiction exercised by the government whose laws they execute; also of the acts of the executive branch of the government, in the enforcement of the treaties or public laws of the country (*Jones* vs. *U. S.*, 137 U. S. 202, 214, 11 Sup. Ct. 80); also of all matters of general history or of public notoriety; also of the official character of persons appointed by the president or heads of the departments or of the bureaus therein for the performance of duties created by acts of congress (*Brown* vs. *Piper*, 91 U. S. 37; *Keyser* vs. *Hitz*, 133 U. S. 138 to 145, 10 Sup. Ct. 290.)"

The court then proceeds to discuss the relations between the Indians and the United States Government under the treaties involved in this case.

United States vs. *Foster*, U. S. Cir. Ct. Wisconsin 1870, 2 Bissell,

the same power that can make treaties with foreign nations can make them with Indians, but the construction of the treaty so made is necessarily subject to those peculiar rela-

377, Fed. Cases 15141, DRUMMOND, J.

In an action to restrain the cutting of timber on Indian lands reserved under the treaty of 1831 with the Menominee Indians, held that they could use timber sufficient to support themselves and their families, and they must be treated as the owners of the land, although their ownership was subject to the rights of the sovereignty of the United States.

The Kansas Indians, U. S. Sup. Ct. 1866, 5 Wallace, 737, DAVIS, J.

Held, that rules of interpretation favorable to Indian tribes are to be adopted in construing our treaties with them, hence a provision in an Indian treaty which exempts their lands from levy, sale and forfeiture is not, in the absence of expressions to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers for non-payment of taxes.

Libby vs. *Clark*, U. S. Sup. Ct. 1886, 118 U. S. 250, MILLER, J.

Held, that "the provisions in Article VII of the Treaty of June 24, 1862, with the Ottawa Indians of Blanchard's Fork and Roche de Boeuf, 12 Stat. 1237, limiting the power of alienating granted lands, apply to the grants authorized by Article III of the treaty to be made to chiefs, councilmen, and headmen of the tribe; and deeds made in violation of that limitation (as it was incorporated by the land office into patents for lands allotted to chiefs, councilmen, or headmen), are void."

Best vs. *Polk*, U. S. Sup. Ct. 1873, 18 Wallace, 112, DAVIS, J.

The numerous cases citing this case show the way in which treaties with Indians should be construed and also shows the impossibility of dealing with Indians in the same manner as sovereign nations, as the treaties had to be made exactly as the United States was able to handle the property.

Bush vs. *United States*, Ct. Claims, 1894, 29 Ct. Claims, 144, WELDON, J.

Godfrey vs. *Beardsley*, U. S. Cir. Ct. Indiana 1841, 2 McLean, 412, Fed. Cas. 5,497, MCLEAN, J.

Goodfellow vs. *Muckey*, U. S. Cir. Ct. Kans. 1881, 1 McCrary, 238 Fed. Cas. 5,537, FOSTER, J.

Gray vs. *Coffman*, U. S. Cir. Ct. Kans. 1874, 3 Dillon, 393, Fed. Cas. 5,714, DILLON, J.

Henderson vs. *Tenn.*, U. S. Sup. Ct. 1850, 10 How. 311, TANEY, Ch. J.

Ladiga vs. *Roland*, U. S. Sup. Ct. 1844, 2 Howard, 581, BALDWIN, J.

Mann vs. *Wilson*, U. S. Sup. Ct. 1859, 23 Howard, 457, CATRON, J.

Meigs vs. *McClung*, U. S. Sup. Ct. 1815, 9 Cranch, 11, MARSHALL, Ch. J. See reference under § 460, *post*.

Minter vs. *Crommelin*, U. S. Sup. Ct. 1855, 18 Howard, 87, CATRON, J.

Potawatamie Indians vs. *United States*, Ct. Claims, 1892, 27 Ct. Claims, 403, WELDON, J. (Affirmed *sub nomine Pam-to-pee* vs. *U. S.*, U. S. Sup. Ct. 1893, 148 U. S. 691, SHIRAS, J.)

Summers vs. *Spybuck*, Sup. Ct. Kans. 1863, 1 Kan. 394, COBB, Ch. J.

United States vs. *Alaska Packers' Association*, U. S. Cir. Ct.

tions which, as was said in *Cherokee Nation* vs. *Georgia*,[1] exist between the United States and the Indian tribes, and between no other nations in the world.

It can readily be seen that the establishment of treaty relations between a sovereign power such as the United States and nations or tribes wholly dependent upon it, occupying territory within its own boundaries, and subject to its jurisdiction, as the Indian tribes are, became a matter of great embarrassment in the administration of national affairs; it became absolutely necessary, therefore, for the United States to place the Indian tribes remaining in this country upon a footing entirely different from that of independent nations.

§ 416. **The Cherokee Nation at present; Imperium in Imperio; other nations.**—Shortly after the Cherokee-Georgia controversy was settled, the United States Government adopted the policy of transplanting the Indian tribes which were then occupying territory east of the Mississippi to the territory west of that river which had been acquired from France by the Louisiana purchase of 1803. Treaties were made with many of the tribes and nations by which their title to the territory originally claimed by them was extinguished and corresponding reservations were provided for them in what is now Kansas, Nebraska, Oklahama and Indian Territory.[1] From time to time since then other treaties and agreements have been made with these Indians by

Washington, 1897, 79 Fed. Rep. 152, HANDFORD, J.

United States vs. *Brooks*, U. S. Sup. Ct. 1850, 10 Howard, 442, WAYNE, J.

United States vs. *Winans*, U. S. Cir. Ct. Washington, S. D., 1896, 73 Fed. Rep. 72, HANDFORD, J.

United States vs. *Taylor*, Sup. Ct. Wash. 1887, 3 Wash. Rep. 88, HOYT, J.

Warner vs. *Joy*, U. S. Sup. Ct. 1872, 17 Wall. 253. CLIFFORD, J. Decided at the same time on the same grounds as *Holden* vs. *Joy*, 17 Wall. 211.

Western Cherokee Indians vs. *United States*, U. S. Ct. Claims, 1891, 27 Ct. Claims, 1, NOTT, J.

Wilson vs. *Wall*, U. S. Sup. Ct. 1867, 6 Wall. 83, GRIER, J.

See also Wharton's Digest Int. Law, §§ 208 *et seq.* vol. II.

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[1] See § 411, p. 207, *ante*, and see § 132, vol. I, pp. 232, *et seq.*

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[1] For these treaties see the Compilation of Indian Treaties of 1873, published by the Interior Department.

which portions of the territory so reserved for them has been repurchased by the United States and thrown open for settlement. Amongst the tribes which were thus removed were the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, which are now known as the five civilized tribes and with which the Dawes' Commission are now negotiating for a final adjustment for the division of their lands in severalty as has been stated in a previous section.[2]

Under these treaties of removal the tribes established governments for themselves and their right to self-government has been respected by the United States Government and upheld by the courts so long as the provisions of the treaties were complied with. Within the Indian Territory there exists an *Imperium in Imperio*, the exact *status* of which it has been sometimes difficult to determine.[3] The five tribes above re-

[2] See § 406, pp. 201, *et seq.*, *ante*.

[3] *Thebo* vs. *Choctaw Tribe of Indians*, U. S. Cir. Ct. App. 8th Cir. 1895, 66 Fed. Rep. 372, CALDWELL, J. This case is cited at length because it shows to what extent the courts go in protecting these Indian tribes from interference; it was held, as stated in the syllabus:

"The United States court in the Indian Territory has no jurisdiction of an action against the Choctaw Nation, or the chief executive officers thereof, when sued in their capacity as such, for an alleged debt or liability of the Nation, and when the judgment will operate against the Nation."

In reaching this conclusion the court says in regard to the status of the nation as follows (pp. 375–376):

"While the nation has many of the attributes of the political unit which constitutes the civil and self-governing community called a 'State' or a 'Nation,' it is not a sovereign state, but it is a domestic and dependent state, subject to the jurisdiction and authority of the United States. Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it

ferred to have been mentioned as examples only, for the full list of tribes removed and for the circumstances under which the removals took place the records of the Interior Department must be examined and it would require more space than can be devoted to it in this volume to even give a list of the treaties and the decisions on cases arising thereunder when it has been necessary to construe them. A few decisions on the status of some of the tribes are given in the notes to this section.[4]

may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.' *Beers vs. Arkansas*, 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the States of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all, of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the Supreme Court of the United States, in *Chisholm* vs. *Georgia*, 2 Dall. 419, decided that under the constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state 'is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion.' *In re Ayers*, 123 U. S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the States under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms. The judgment of the United States court in the Indian Territory is affirmed."

[4] *Cherokee Nation* vs. *Southern*

§ 417. **Complications arising from treaty method of dealing with Indians; anomalous conditions owing to dependent relations.** — Anomalous conditions were often created by concluding a treaty with an Indian tribe through

Kansas Railway Co., U. S. Sup. Ct. 1890, 135 U. S. 641, HARLAN, J.

"The Cherokee Nation is not sovereign in the sense that the United States or a State is sovereign, but is now, as heretofore, a dependent political community, subject to the permanent authority of the United States."

The Cherokee Trust Funds, U. S. Sup. Ct. 1885, 117 U. S. 288, FIELD, J.

The opinion contains a lengthy history of the Cherokee Nation and its various divisions and migratory movements, and the *status* of those bands of Indians which did not remove west of the Mississippi with the tribe.

Mehlin vs. *Ice*, U. S. Cir. Ct. App. 8th Cir. 1893, 12 U. S. App. 305, CALDWELL, J. Status of Cherokee Indians stated and defined.

Porterfield's Executors vs. *Clark*, U. S. Sup. Ct. 1844, 2 Howard, 76, CATRON, J.

The boundaries of the Cherokee Indians as fixed by the treaties were historically examined and the nature, limits and effects of various grants. *Held*, that acts of the State applied to Indian territory so far as the treaties would permit and that upon the extinguishment of Indian titles and grants the laws of States extended over the country. There is an extended history of the relations of the United States, Great Britain and Spain with the Cherokee Indians contained in the opinion.

Thomas vs. *Gay*, U. S. Sup. Ct. 1898, 169 U. S. 264, SHIRAS, J.

Jordan vs. *Goldman*, Dist. Ct. Okla. 1891, 1 Okla. Rep. 406, GREEN, J.

In this case the history of the Cherokee treaties and the effect of subsequent statutes passed by the United States, and the final condition of the Indian title as to what is known as the Cherokee Outlet is considered at length and determined. The entire brief of the United States attorney showing the position assumed by the government is included in the report of the case.

Held, that certain tax statutes of the Territory of Oklahoma affecting cattle grazing on Indian Reservations were constitutional and valid.

United States vs. *Wilson*, U. S. Sup. Ct. 1861, 1 Black, 267, NELSON, J.

In this case a Californian-Mexican land grant to an Indian was confirmed on account of the usages of the Mexican Government prior to the transaction.

Guthrie vs. *Hall*, Dist. Ct. Oklahoma, 1891, 1 Okla. 454, SEAY, J.

Journeycake vs. *Cherokee Nation*, U. S. Ct. of Claims, 1896, 31 Ct. of Claims, 140, NOTT, J.

Journeycake vs. *United States*, U. S. Ct. of Claims, 1893, 28 Ct. of Claims, 281, NOTT, J.

Mackey vs. *Coxe*, U. S. Sup. Ct. 1855, 18 Howard, 100, MCLEAN, J.

Standley vs. *Roberts*, U. S. Cir. Ct. App. 8 Cir. 1894, 59 Fed. Rep. 836, SANBORN, J.

Taltan vs. *Mayes*, U. S. Sup. Ct. 1896, 163 U. S. 376, WHITE, J.

negotiations carried on wholly within the United States, with people who, although they were not citizens of the United States, resided therein, and were subject to its laws, and to the action of the Federal Government in regulating their commercial affairs; this position became all the more anomalous when any treaty stipulation was violated either by the tribe or by the United States. When a treaty has been violated by a foreign nation the United States can make its reclamation through the proper channels and compel the nation either by diplomatic action—possibly by threat of war—to make proper restitution; if a foreign nation claims that the United States has violated a treaty, its claims can be similarly made and the United States responds thereto either by proper acknowledgment, or by proving either that the treaty has not been violated or that no damage has been sustained which can be made the basis of a reclamation. In regard to Indian treaties, however, if any violation occurs by the enactment of a statute contravening the treaty, the Supreme Court has held that it is simply a superior act on the part of Congress, which either supersedes the treaty to that extent, or abrogates it altogether; the United States in such cases either regards the treaty as superseded or abrogated, and the Indians are left without any recourse except as they may be permitted to prove whatever damages may have been sustained in the courts of the United States, and, upon proof of damage, Congress has generally indemnified the Indians in such manner and to such extent as the court has decreed to be fair and proper. On the other hand when Indians violate any treaty stipulations, the United States by force of its superior position is able to immediately proceed to confiscate lands of the Indians, or to punish them in such manner as Congress, or in some cases the Executive, may determine. These conditions demonstrate practically the impossibility of maintain-

United States vs. *Boyd*, U. S. Cir. Ct. App. 4th Cir. 1897, 42 U. S. App. 637, GOFF, J.

This was one of the *Cherokee cases* involving the relations of that tribe to the Government, the validity of contracts made with them, and is an exhaustive resumé of the legal relations of the tribes to the United States.

Bell vs. *Atl. & Pac. R. R. Co.*, U. S. Cir. Ct. App. 8th Cir. 1894, 27 U. S. App. 305, CALDWELL, J.

ing treaty relations between States where all the contracting parties are not possessed of every attribute of sovereignty and able to exercise them. The relations of the tribes to the United States, and the responsibility for depredations by Indians are discussed in many cases decided by the court of claims, some of which are referred to in the notes.[1] In some of these cases the court of claims has held that the principles of international law should be applied to our dealings with Indian tribes.[2]

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[1] *Brown* vs. *United States*, U. S. Ct. Claims, 1897, 32 Ct. Claims, 432, NOTT, J.

Connor vs. *United States*, Ct. Claims, 1884, 19 Ct. Claims, 675, RICHARDSON, J.

Friend vs. *United States*, U. S. Ct. Claims, 1894, 29 Ct. Claims, 425, RICHARDSON, CH. J.

Garrison vs. *United States*, U. S. Ct. Claims, 1895, 30 Ct. Claims, 272, PEELLE, J.

Janis vs. *United States*, Ct. of Claims, 1897, 32 Ct. of Claims, 407, NOTT, Ch. J.

Kendall vs. *United States*, U. S. Sup. Ct. 1868, 7 Wallace, 113, MILLER, J. (Affirming Ct. Claims, 1865, 1 Ct. Claims, 261, PECK, J.)

Labadi vs. *United States*, Ct. Claims, 1896, 31 Ct. Claims, 205, WELDON, J.

Leighton vs. *United States*, U. S. Sup. Ct. 1896, 161 U. S. 291, BREWER, J. (Affirming Ct. Claims, 1894, 29 Ct. Clms, 288, PEELLE, J.)

Held, (in Ct. Claims—see syllabus) in determining certain Indian depredation claims that the court cannot inquire whether a treaty was properly executed or whether it was procured by undue influence and that where the political departments continued to recognize an Indian treaty it must be inferred that the tribe was then recognized as in amity, but such presumption is not conclusive.

Litchfield vs. *United States*, U. S. Ct. Claims, 1898, 33 Ct. Claims, 203, PEELLE, J.

Love vs. *United States*, U. S. Ct. Claims, 1894, 29 Ct. Claims, 332, NOTT, J.

Mares vs. *United States*, U. S. Ct. Claims, 1894, 29 Ct. Claims, 197, WELDON, J.

Moore vs. *United States*, U. S. Ct. Claims, 1897, 32 Ct. Claims, 593, PEELLE, J. Definition of treaty relations with Indians examined.

United States vs. *Navarre*, U. S. Sup. Ct. 1899, 173 U. S. 77, MCKENNA, J. (Affirming *Navarre* vs. *United States*, 33 Ct. Claims, 235).

Valk vs. *United States*, U. S. Ct. Claims, 1894, 29 Ct. Claims, 62, RICHARDSON, Ch. J.

See also *Briggs* vs. *Sample*, U. S. Cir. Ct. Kans. 1890, 43 Fed. Rep. 102, FOSTER, J.

Cherokee Nation vs. *Journeycake*, U. S. Sup. Ct. 1894, 155 U. S. 196, BREWER, J.

Frost vs. *Wenie*, U. S. Sup. Ct. 1895, 157 U. S. 46, HARLAN, J.

Leavenworth L. & G. R. R. Co. vs. *United States*, U. S. Sup. Ct. 1875, 92 U. S. 733, DAVIS, J.

See also land grant and treaty cases cited in notes under next section.

[2] *Leighton* vs. *United States*, U. S.

§ 418. **Railroad land grants and treaty reservations.**—On numerous occasions Congress has made extensive land grants to railroad companies to encourage and aid in the building of railroads in the western parts of this country. Many of those roads were located through territory which was included in the reservations set apart for Indians under treaties made long prior to the enactment of the land grant

Ct. of Claims, 1894, 29 Ct. of Clms. 288, PEELLE, J., affirmed U. S. Sup. Ct. 1895, 161 U. S. 291, BREWER, J. *Love* vs. *United States*, U. S. Ct. of Claims, 1894, 29 Ct. of Clms. 332, NOTT, J. These were cases under the Indian depredation acts and the relations of tribes of Indians with the United States during periods of peace and of war were discussed at length. The application of the principles of international law were referred to in opinion in the *Love* case as follows (pp. 346–8):

"The principles of international law have been applied to hostilities with the Indian tribes so far as to accord to them the rights of a belligerent. It is too well settled to need citations that an Indian warrior in a war waged within the boundaries of a State cannot be tried for murder or robbery in its courts. The international rule which holds a nation responsible for the acts of its members so long as peace continues may be illogical, but it is world-wide. . . .

"The law of nations 'defines the rights and prescribes the duties of nations in their intercourse with each other' (1 Kent's Com. p. 1); and it, 'although not specifically adopted by the Constitution, is essentially a part of the law of the land' (Attorney-General Randolph, 1 Opin. p. 27). 'That the law of nations constitutes a part of the laws of the land is established from the face of the Constitution upon principle and by authority' (Attorney-General Speed, 11 Opin. p. 299). International law operates in these cases in two ways; it gives to these claimants a right of redress for depredations upon their property in time of peace, and it gives to these Indian defendants a right to the impartial judgment of a court under the general principles which regulate the affairs of nations. The question, of course, will be, in each case where the recovery depends upon the action of the United States when they concluded peace with a warring tribe, whether they asserted a right to indemnity. If the Government did not, the individual suitor cannot." [These liabilities are then compared to those of the Civil War, and reference made to the fact that Congress refused to pay for losses incidental to war].

"5. Where the liability of Indian defendants depends upon a treaty by which they assumed responsibilities for past or future wars, liabilities not imposed by international law or by statute, the right of the claimant to recover will be measured by the terms of the treaty."

statutes. The necessity of connecting the East and the West by rail was paramount to all other considerations. It was impossible to prevent it, and as it was necessary to cross the Indian reservations rights of way were given to the companies. In some instances new treaties were made with the Indians whose reservations were affected; in other cases Congress acted first and adjusted the matter afterwards, sometimes providing in the statutes for compensation, sometimes leaving it to the court, and sometimes not making any direct provision whatever. Under such circumstances matters involving the construction of Indian treaties reserving territory for the Indians and subsequent statutes granting the same territory to railroad companies frequently came before the courts. The rule adopted, generally speaking, has been to uphold and construe the treaty and the statute together whenever possible, but, if impossible to do so, the later statute must prevail, the grant be upheld, and the loss sustained by the Indians settled by Congress, or by the Court of Claims, or such other court, as may have jurisdiction, either under general statutes or ones passed for the special occasion.

There are over a hundred statutes and as many decisions involving these questions; a few cases only are referred to in the notes.[1] The treaties can be found by examining the

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[1] *Buttz* vs. *Northern Pacific Railroad*, U. S. Sup. Ct. 1886, 119 U. S. 55, FIELD, J.

Cal. & Ore. Land Co. vs. *Worden*, U. S. Cir. Ct. Ore. 1898, 85 Fed. Rep. 94, and 87 Fed. Rep. 532, BELLINGER, J.

Cherokee Nation vs. *Southern Kansas Railway Co.*, U. S. Sup. Ct. 1890, 135 U. S. 641, HARLAN, J.

Illinois Steel Co. vs. *Budzisz*, U. S. C. C. E. D. Wis. 1897, 82 Fed. Rep. 160, SEAMAN, J. And see also *Budzisz* vs. *Illinois Steel Co.*, U. S. Sup. Ct. 1898, 170 U. S. 41, SHIRAS, J.

Leavenworth &c. R. R. Co. vs. *United States*, U. S. Sup. Ct. 1875, 92 U. S. 733, DAVIS, J.

M. K. & T. R. R. Co. vs. *Roberts*, U. S. Sup. Ct. 1894, 152 U. S. 114, FIELD, J.

M. K. & T. R. R. Co. vs. *United States*, U. S. Sup. Ct. 1875, 92 U. S. 760, DAVIS, J.

Shepard vs. *N. W. Life Ins. Co.*, U. S. Cir. Ct. Michigan, 1889, 40 Fed. Rep. 341, BROWN, J.

Ross vs. *Eells*, U. S. Cir. Ct. N. D. Wash. 1893, 56 Fed. Rep. 855, HANFORD, J. And see also *Eells* vs. *Ross*, 64 Fed. Rep. 417.

St. Paul, etc., Ry. Co. vs. *Phelps*, U. S. Sup. Ct. 1890, 137 U. S. 528, LAMAR, J.

Stroud vs. *Missouri River, etc., R. R. Co.*, U. S. Cir. Ct. Kan. 1877, 4 Dillon, 396, Fed. Cas. 13,547, DILLON, J.

Utah & Northern Ry. Co. vs.

Indian treaty volume of 1873 and the statutes are generally referred to in the opinions. The abandonment of the treaty method of dealing with Indians has greatly lessened this class of cases.

§ 419. **Criminal jurisdiction; treaty provisions and statutes.**—Many of the Indian treaties contain provisions for the trial of Indians by their own tribunals.

The special provisions of the treaties control the extent of this exclusive jurisdiction, which depends upon the nationality of the accused and the locality of the crime.

In a leading case by the Supreme Court[1] the history of

Fisher, U. S. Sup. Ct. 1885, 116 U. S. 28, FIELD, J.

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[1] *United States* vs. *Kagama*, U. S. Sup. Ct. 1886, 118 U. S. 375, MILLER, J.

The questions in this case arose on demurrer to an indictment against two Indians for murder of another Indian, committed on an Indian reservation in California.

The question was whether the United States had the right to pass the act of 1885, giving Congress necessary jurisdiction to try Indians under such circumstances on reservations and where tribal relations still existed.

The court reviewed the relation of the Indians to the United States at length, and the right of the United States to govern territories, referring to the cases of the *Cherokee Nation* vs. *State of Georgia*, 5 Peters, 1; *Murphy* vs. *Ramsey*, 114 U. S. 15; *American Insurance Company* vs. *Canter*, 1 Peters, 511, *United States* vs. *Rogers*, 4 Howard, 567, and in regard to the present status of the Indians and the right of the United States to legislate in regard to them the court says (pp. 381–385):

"The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadalupe-Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

"Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could

Indian relations was reviewed at length and the jurisdiction of the Indian tribal courts sustained to the exclusion of that of the United States courts.

be done. The United States recognized no right in private persons, or in other nations to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

"Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the *Cherokee Nation* vs. *Georgia*, 5 Peters, 1, and in the case of *Worcester* vs. *State of Georgia*, 6 Peters, 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable résumé of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

"In the first of the above cases it was held that these tribes were neither states nor nations, and had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

"In the opinions in these cases they are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in sec. 2079, U. S. Revised Statutes (the section is then quoted as on p. 197, *ante*):

"The case of *Crow Dog*, 109 U. S. 556, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal sec. 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country.

A number of cases are cited in the notes[2] in which the jurisdiction of Federal, State and Territorial courts has been the sole question argued and decided in trials of Indians.

The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a state.

"Is this latter fact a fatal objection to the law? The statute in itself contains no express limitation upon the powers of a state or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the state, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends. Does that authority extend to this case?

"It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

"It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and Congress, and by this court, whenever the question has arisen.

"In the case of *Worcester* vs. *The State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

[2] For note 2 see p. 229.

§ 420. **Indian citizenship; treaties and statutes; status of native inhabitants of acquired possessions.**—The ques-

"The same thing was decided in the case of *Fellows* vs. *Blacksmith*. 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761.

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary for their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

[2] *Famous Smith* vs. *United States*, U. S. Sup. Ct. 1894, 151 U. S. 50, BROWN, J.

Indian jurisdiction sustained: *Held*, that the United States courts had no jurisdiction under the Cherokee Treaties to try an Indian for killing an Indian in the Cherokee Nation's territory. *Held* also that the burden of proof was on the prosecution to prove that the murdered man in the Indian country was not an Indian.

Harkness vs. *Hyde*, U. S. Sup. Ct. 1878, 98 U. S. 476, FIELD, J.

Held, that under the provisions of the treaty with the Shoshone Indians, process from the Dis. Ct. of Idaho cannot be served upon a defendant on any Indian reservation in that territory.

In re Mayfield, U. S. Sup. Ct. 1891, 141 U. S. 107, BROWN, J.

This was a petition for a writ of *habeas corpus* on behalf of an Indian member of the Cherokee Nation who had been arrested, tried and convicted in the United States District Court for the Western District of Arkansas for the crime of adultery with a white woman, not an Indian.

The petitioner claimed that under the treaty with the Cherokee Indians he was amenable only to the courts of the Nation.

The Supreme Court so held and discharged the prisoner; the opinion recites the treaties, various statutes and the power given to the Cherokee Nation.

Nofire vs. *United States*, U. S. Sup. Ct. 1897, 164 U. S. 657, BREWER, J.

Held, that where the Cherokee nation adopted a citizen into a tribe, he was to be considered a citizen of the tribe and that jurisdiction over an offence would be vested in the courts of the Cherokee Nation under the laws of the United States and the treaties with that Nation.

State of Maine vs. *Newell*, Sup. Ct. Me. 1892, 84 Me. 465, EMERY, J.

A Passamaquoddy Indian indicted under a State statute for killing fish and game, pleaded exemptions under an Indian treaty, but the

tion of Indian citizenship has also occasioned much discussion and litigation. Some of the treaties provide for meth-

court overruled the demurrer, holding that while Indians resident within this State have a partial organization for tenure of property and local affairs, they have now no separate political organization, and are subject as individuals to all the laws of the State.

State of Minnesota vs. *Campbell*, Sup. Ct. Minn. 1893, 53 Minn. 354, MITCHELL, J.

Held, that in the absence of treaty stipulations, the criminal laws of a State, except so far as restricted by Congressional legislation, extend to crimes committed on Indian reservations by persons who are not Indians connected with their tribes, but that Indians retaining their tribal relations are subject exclusively to Congressional jurisdiction and are not subject to the laws of a State.

United States vs. *Thomas*, U. S. Sup. Ct. 1894, 151 U. S. 577, FIELD, J.

Jurisdiction of an Indian charged with murder, not within the limits of the Chippewa Reservations sustained.

United States vs. *McBratney*, U. S. Sup. Ct. 1881, 104 U. S. 621, GRAY, J. *Held;* the United States Circuit Court in Colorado has no jurisdiction of an indictment against a white man for the murder of a white man within the Ute Reservation within the State of Colorado. Also *held* that the enabling act for the formation of the Government of Colorado of March 3, 1875, did not create any exception on the ground that the provisions of the treaty were not inconsistent therewith.

United States vs. *Martin*, U. S. Dist. Ct. Ore. 1883, 14 Fed. Rep. 817, DEADY, J.

Jurisdiction of the Circuit Court over crimes committed on the Umatilla Reservation under treaty of 1855 sustained.

United States vs. *Rodgers*, U. S. Dist. Ct. Ark. 1885, 23 Fed. Rep. 658, PARKER, J.

Jurisdiction of the Cherokee Nation as to crimes committed on a strip known as the Cherokee Outlet, discussed and defined, and reviewing United States statutes and treaties affecting the Cherokee Indians.

Alberty vs. *United States*, U. S. Sup. Ct. 1896, 162 U. S. 499, BROWN, J.

Jurisdiction of United States court upheld.

In re Captain Jack, U. S. Sup. Ct. 1889, 130 U. S. 353, MILLER, J.

In re Gon-shay-ee, U. S. Sup. Ct. 1889, 130 U. S. 343, MILLER, J.

Ex parte Crow Dog, U. S. Sup. Ct. 1883, 109 U. S. 556, MATTHEWS, J.

An Indian, convicted of murder and sentenced to death under the decision of a territorial court, on *habeas* claimed that the court was without jurisdiction on account of treaty stipulations giving exclusive jurisdiction over crimes committed by Indians in an Indian country to the tribal courts. The Supreme Court held that the territorial court was without jurisdiction.

Lucas vs. *United States*, U. S. Sup. Ct. 1896, 163 U. S. 612, SHIRAS, J.

State of New Jersey vs. *Wilson*, U. S. Sup. Ct. 1812, 7 Cranch, 164, MARSHALL, Ch. J. Involving legislative acts of New Jersey.

ods by which Indians may be naturalized, while other treaties are silent on that point. The question of Indian citizenship in general has been discussed by Wharton[1] and there have been some recent decisions in regard thereto by the Supreme Court.[2]

The status of the native or aboriginal inhabitants of acquired territory has on more than one occasion given rise to

Taltan vs. *Mayes*, U. S. Sup. Ct. 1896, 163 U. S. 376, WHITE, J. Status of Cherokee Nation and jurisdiction as to crimes discussed and sustained.

United States vs. *Berry*, U. S. Cir. Ct. Colorado, 1880, 2 McCrary, 58, MCCRARY, J.

United States vs. *Bridleman*, U. S. Dist. Ct. Ore. 1881, 7 Sawyer, 243, DEADY, J.

United States vs. *Clapox*, U. S. Dist. Ct. Ore. 1888, 35 Fed. Rep. 575, DEADY, J.

United States vs. *Leathers*, U. S. Dist Ct. Nev. 1879, 6 Sawyer, 17, HILLYER, J.

United States vs. *Pridgeon*, U. S. Sup. Ct. 1894, 153 U. S. 48, JACKSON, J. Jurisdiction of United States Courts sustained.

United States vs. *Rogers*, U. S. Sup. Ct. 1846, 4 Howard, 567, TANEY, Ch. J. Leading case.

United States vs. *Sturgeon*, U. S. Dist. Ct. Nevada, 1879, 6 Sawyer, 29, HILLYER, J.

United States vs. *Yellow Sun*, U. S. Cir. Ct. Nebraska, 1870, 1 Dillon, 271, DILLON, J.

Westmoreland vs. *United States*, U. S. Sup. Ct. 1895, 155 U. S. 545, BREWER, J. Jurisdiction of United States Courts sustained.

§ 420.

[1] Wharton's Digest, Int. Law, vol. II, § 196, p. 481.

[2] *Elk* vs. *Wilkins*, U. S. Sup. Ct. 1884, 112 U. S. 94, GRAY, J.

This is not a treaty case, but it involves the status of Indians as to citizenship.

The points decided are stated in the syllabus as follows:

"An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized, or taxed, or recognized as a citizen, either by the United States or the State, is not a citizen of the United States, within the meaning of the first section of the Fourteenth Article of Amendment of the Constitution.

"A petition alleging that the plaintiff is an Indian, and was born within the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States, and is a *bona fide* resident of the State of Nebraska and city of Omaha, does not show that he is a citizen of the United States under the Fourteenth Article of Amendment the Constitution."

See also *United States* vs. *Kagama*, U. S. Sup. Ct. 1886, 118 U. S. 375, MILLER, J., and extract from opinion in note to § 419, pp. 226, *et seq.*, *ante*.

the question of whether they are *Indians* in the sense that that word is used in Constitution giving Congress jurisdiction to govern them to the same extent that it has over the aborigines of the thirteen original States.

Congress has assumed such jurisdiction over the native tribes which were similar in native habits and customs to the aborigines between the Atlantic and Pacific on many occasions. Many of the native inhabitants of Louisiana, Mexico and Alaska have been classed and governed as *Indians*. In some instances the treaties specially provided for the treatment of inhabitants of European descent and committed the government of *native* inhabitants to Congress. The treaty of 1898 with Spain provides that the "civil and political status of the inhabitants of the ceded territory shall be determined by Congress."[3]

Some of the cases involving the status of Indians or native inhabitants of ceded territory are cited in the notes to this section.[4] If the native inhabitants of the recently acquired territory are to be considered as Indians, Congress

[3] The treaties with France of 1803, Mexico of 1848 and 1853, Russia of 1867, and Spain of 1819 and 1898, should be examined. See TREATIES APPENDIX at end of this volume; that with Spain of 1898 is printed in full, Vol. I., p. 508.

[4] *United States* vs. *Ritchie*, U. S. Sup. Ct., 1854, 17 How. 525, NELSON, J.

Held, that a Mexican Indian had a right to take and hold Mexican grants under the Treaty of 1848, under the circumstances of his ownership prior to the treaty. No opinion is expressed in this decision as to the effect of any other titles under other circumstances.

United States vs. *Joseph*, U. S. Sup. Ct. 1876, 94 U. S. 614, MILLER, J.

United States vs. *Kagama*, U. S. Sup. Ct. 1886, 118 U. S. 375, MILLER, J. See extracts under § 419, p. 226, *post*.

United States vs. *Payne*, U. S. Cir. Ct. Ark. 1881, 2 McCrary, 289, PARKER, J.

United States vs. *Sunol*, U. S. Dist. Ct. Cal. 1855, Fed. Cases, 16,421, HOFFMAN, J.

Mitchel vs. *United States*, U. S. Sup. Ct. 1835, 9 Peters, 711, BALDWIN, J. U. S. Sup. Ct. 1841, 15 Peters, 52, WAYNE, J.

The status and rights of Indians and of persons dealing with them under treaties and contracts executed prior to the cession of Florida to the United States discussed at length.

United States vs. *Wilson*, U. S. Sup. Ct. 1861, 1 Black, 267, NELSON, J. In this case a California-Mexican land grant to an Indian was confirmed on account of the usages of the Mexican Government prior to the transaction.

McKay vs. *Campbell*, U. S. Dist. Ct. D. Oreg. 1871, 2 Sawyer, 118,

can govern them under the constitutional power as well as under the provisions of the treaty.

§ 421. **Abandonment of treaty method proper course for Congress to pursue.**—This state of affairs continued until 1867[1] when an act of Congress was passed providing that from that time no more treaties should be entered into, but that all relations with the Indians should be regulated either by contract, or by an act of Congress, since which time transactions have been conducted in pursuance of this plan; treaty stipulations are still the subject of controversy in the courts, however, when questions arise as to the vested rights of Indians under treaties made prior to 1871.

This was a sensible and proper course to pursue; the United States now no longer regulates its relations with Indians, or Indian affairs of any nature, by treaties or in any manner except under the constitutional power to regulate commerce with the Indian tribes, together with the power to make rules and regulations for the territory of the United States. It must be remembered that all Indian lands are owned by the United States, subject only to the Indian right of occupancy,(with the exception of some reservations which are owned by the States), but in all cases also subject to the right to regulate all matters relating to the Indians which Congress has reserved to itself. Ample power, therefore, exists in Congress to regulate in every respect, not only the commerce between the people of the United States and the Indians, but also everything under governmental control which transpires upon territory to which the United States has the paramount title, even while it is subject to the easement of the Indians' right of occupancy.

§ 422. **This chapter confined to treaty-making with Indians; no attempt made to review history of relations between United States and Indians, or to discuss propriety of treatment.**—In this brief review of the treaty regulations of the United States with the Indian tribes, no attempt has been made to review the history of the extinguishment of

DEADY, J. Status of Oregon Indians involved after settlement of northwestern boundary.

§ 421.

[1] 16 U. S. Stat, at L. p. 566, see also U. S. Rev. St. at §§ 2079, *et seq.*, quoted under § 403, p. 197, *ante*.

the Indian title in the United States, or to discuss the question of whether or not the Indians have been justly, or unjustly, treated by the Federal Government;[1] the author however has no sympathy with those who blame the government in a wholesale manner in this respect, and, so far as the courts are concerned, there is no foundation for any charges of injustice.

§ 423. **Supreme Court has always afforded protection to Indians both as to rights of property and of person.**—Indeed the facts which impress themselves most strongly upon the mind of anyone studying the history of the Indians so far as treaty relations are considered, are that those aboriginal inhabitants of our country, both as tribes and as individuals, have been afforded the same standing in the courts of the United States as has been afforded to citizens of the United States and of foreign powers; that all questions in regard to the ownership of land formerly occupied by them either for villages or hunting grounds, and the distribution of money paid therefor, have been finally adjudicated by the Supreme Court of the United States, in the same manner as questions between citizens, corporations and States of this nation have been adjudicated; that so far as the protection of constitutional, statutory or treaty rights are concerned, whenever it has been the province of the Supreme Court of the United States to pass upon questions affecting Indians, either as to their personal rights, or their ownership of territory, they have had the same protecting arm of the law thrown around them as has ever been afforded to any suitor or litigant in that court; that while the United States, through its Executive and Legislative departments continued to establish treaty relations with those tribes, the courts of the United States extended to the treaties so entered into by those departments of the government the same faith, sanctity and character as they gave to treaties entered into in the same manner with any other power on the face of the earth; and now that the relations formerly regulated by treaty are made the subject of contracts between the tribes and the Federal govern-

§ 422.

[1] See Theodore Roosevelt's Winning of the West, for valuable and interesting *data* as to Indian tribes and their treatment by the United States Government.

ment, the same protection[1] will undoubtedly be afforded to those people whom Chief Justice Marshall declared were in a state of pupilage to the United States which must always remain their guardian, as is given to any other holders of contract rights who come before that tribunal and ask for its protection.

President Roosevelt[2] has recently expressed his views as

§ 423.

[1] *Choctaw & Chickasaw Nations* vs. *United States*, U. S. Ct. Claims, 1899, 34 Ct. Claims, 17, HOWRY, J.

Choctaw Nation vs. *United States*, U. S. Sup. Ct. 1886, 119 U. S. 1, MATTHEWS, J. (Reversing U. S. Ct. Claims, 1884, 19 Ct. Claims, 243, RICHARDSON, J.)

The Eastern Band of Cherokees vs. *United States*, U. S. Ct. Claims, 1885, 20 Ct. Claims, 449, RICHARDSON, Ch. J., affirmed, *sub nomine*, *The Cherokee Trust Funds*, U. S. Sup. Ct. 1885, 117 U. S. 288, FIELD, J. The opinion in this case contains a lengthy history of the Cherokee Nation and its migrations.

Pam-to-pee vs. *United States*, U. S. Sup. Ct. 1893, 148 U. S. 691, SHIRAS, J. (Affirming *Potawatamie Indians* vs. *United States*, U. S. Ct. Claims, 1892, 27 Ct. Claims, 403, WELDON, J.; *United States* vs. *Old Settlers*, U. S. Sup. Ct., 1893, 148 U. S. 427, FULLER, Ch. J.)

These are some of the cases distributing the funds under treaty provisions between Indians; an examination of them shows the complicated condition of rights of Indians arising under treaties and sales of lands and the extent to which the courts of the United States have had to act as their guardians.

In re Sah Quah, U. S. Dist. Ct. Alaska, 1886, 31 Fed. Rep. 327, DAWSON, J.

Western Cherokee Indians vs. *United States*, U. S. Ct. Claims, 1891, 27 Ct. Claims, 1, NOTT, J.

Westmoreland vs. *United States*, U. S. Sup. Ct. 1895, 155 U. S. 545. BREWER, J. In this case, on the facts, the jurisdiction of the United States Court over Indians pursuant to treaty stipulations was sustained.

New York Indians vs. *United States*, Court of Claims, 1895, 30 Ct. of Clms. 413, DAVIS, J., aff'd U. S. Sup. Ct. 1899, 173 U. S. 464, BROWN, J.

United States vs. *Blackfeather*, U. S. Sup. Ct. 1894, 155 U. S. 180. BROWN, J. Rights of Indians under numerous treaties adjudicated and adjusted.

[2] PRESIDENT ROOSEVELT ON TREATMENT OF THE INDIAN.

In his first annual message transmitted to Congress on December 3, 1901, President Roosevelt expressed his views on this subject as follows:

"In my judgment the time has arrived when we should definitely make up our minds to recognize the Indian as an individual, and not as a member of a tribe. The general allotment act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual. Under its provisions some 60,000 Indians have already become citizens of the United States. We should now break up the tribal funds, doing for them what allotment does for the tribal lands;

to the necessity of terminating the tribal relations of the Indians still remaining in this country. These suggestions are so timely and appropriate that they are included as a final note to this chapter.

that is, they should be divided into individual holdings. There will be a transition period during which the funds will in many cases have to be held in trust. This is the case also with the lands. A stop should be put upon the indiscriminate permission to Indians to lease their allotments. The effort should be steadily to make the Indian work like any other man on his own ground. The marriage laws of the Indians should be made the same as those of the whites.

"In the schools the education should be elementary and largely industrial. The need of higher education among the Indians is very, very limited. On the reservations care should be taken to try to suit the teaching to the needs of the particular Indian. There is no use in attempting to induce agriculture in a country suited only for cattle raising, where the Indian should be made a stock grower. The ration system, which is merely the corral and the reservation system, is highly detrimental to the Indians. It promotes beggary, perpetuates pauperism and stifles industry. It is an effectual barrier to progress. It must continue to a greater or less degree as long as tribes are herded on reservations and have everything in common. The Indian should be treated as an individual—like the white man. During the change of treatment inevitable hardships will occur; every effort should be made to minimize these hardships; but we should not, because of them, hesitate to make the change. There should be a continuous reduction in the number of agencies.

"In dealing with the aboriginal races few things are more important than to preserve them from the terrible physical and moral degradation resulting from the liquor traffic. We are doing all we can to save our own Indian tribes from this evil. Wherever by international agreement this same end can be attained as regards races where we do not posses exclusive control, every effort should be made to bring it about."

CHAPTER XV.

CERTAIN SPECIFIC INSTANCES IN WHICH TREATY-MAKING POWER HAS BEEN EXERCISED BY UNITED STATES.

SECTION.

424—Specific instances in which the treaty-making power has been exercised to be reviewed, before discussing its limitations.

425—Justice Field's opinion in *Geofroy* vs. *Riggs* again referred to.

426—Justice Field's views compared with those of Chancellor Kent.

427—Cession of territory involved in the Northeastern Boundary settlement of 1842.

428—Detailed list of specific acts done under treaties impossible owing to number and variety.

429—State legislation as controlled by treaty stipulations.

430—Commercial regulations always the subject of treaties.

431—Six subjects to be considered in this chapter classified.

432—Wide extent of treaty-making power exercised in regard to Extradition, but from its frequent occurrence no longer a matter of comment.

433—Power of Executive to extradite without treaty.

434—Power of Executive to extradite under treaty but without legislation.

435—Power of Congress to extradite in absence of treaty.

SECTION.

436—Rights of persons held for extradition from the United States.

437—Rights of persons extradited to the United States.

438—General summary of views in regard to extradition as depending on treaty.

439—Treaties of cession and extent of power exercised.

440—Effect of special clauses in Treaty of Paris on status of inhabitants.

441—Effect of special stipulations in treaties of cession.

442—The exercise of the right of eminent domain under the treaty-making power.

443—Claims against foreign governments as property rights; Justice Story's opinion in *Comegys* vs. *Vasse*.

444—Methods of enforcing claims of this nature; courts and commissions; National and individual claims distinguished.

445—Wide extent of this power both as to claims of citizens and of States; fishery treaties with Great Britain as they affect State ownership of fisheries.

446—Limitations on Congress as to trade-marks.

447—Regulation and protection of trade-marks by treaty.

SECTION.
448—Ex-territoriality; consular courts of foreign countries in the United States.
449—*The Elwine Kreplin*, 1870; *Wildenhus's Case*, 1887.
450—Ex-territoriality; consular courts established by the United States in foreign countries.
451—Trial by jury not necessary in consular courts established by treaty.
452—Consular courts sustained by Supreme Court in *In re Ross*, 1891; Justice Field's opinion.
453—Review of chapter.
454—No treaty ever declared unconstitutional.

§ 424. **Specific instances in which the treaty-making power has been exercised to be reviewed, before discussing its limitations.**—The next and final chapter of this volume will be devoted to discussing whether there are any limitations upon the treaty-making power of the United States, and if so, what those limitations are.

That general subject, however, can only be discussed in an academic manner, as no limitations have actually been placed upon the power either by the Constitution, as expressed in that instrument, or by the Judicial department of the Government, as expressed in the decisions of any of the adjudicated cases involving this question.

Before proceeding, therefore, to that discussion, it will be proper to refer to some specific instances in which the treaty-making power has been exercised to an extraordinary extent. Possibly the deductions which can be drawn from the extent and manner of the exercise of that power in the past with the acquiescence of all the departments of the Government, Executive, Legislative, and Judicial, as well as of the States and the people, may be of material aid in the final discussion as to whether or not any limitations do exist, and if so, what they are, and how they can be ascertained and defined.

§ 425. **Justice Field's opinion in Geofroy vs. Riggs again referred to.**—In the case of *Geofroy* vs. *Riggs*,[1] already referred to, the Supreme Court, speaking through Mr. Justice Field, declared that the treaty-making power of the United States extended to all subjects of negotiation between the Government thereof and the governments of other nations;

§ 425.

[1] *Geofroy* vs. *Riggs*, U. S. Sup. Ct., 1890, 133 U. S. 258, FIELD J., and see extract under § 335, p. 23, *ante*.

that the power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government, or of its departments, and from those arising from the nature of the Government itself, and that of the States; but that it would not be contended that it extended so far as to authorize what the Constitution forbids, or a change in the character of the Government of the United States, or of one of the States, or the cession of any portion of the territory of the latter without its consent; in fact, the learned Justice, who had already decided many cases involving the treaty-making power of the United States, declared that with these exceptions he did not conceive that there were any limitations to that power touching matters which were properly the subject of negotiation with foreign countries.

§ 426. **Justice Field's views compared with those of Chancellor Kent.**—It may be presumptuous on the part of the author of this volume to criticize such an eminent jurist as Stephen J. Field, but as his suggestion in regard to the limitation affecting the cession of any portion of the territory of a State is in direct contradiction with the opinion expressed by no less an authority than Chancellor Kent,[1] the author feels that he is at liberty to choose between the two, and that he can exercise the choice without being disrespectful to either. In expressing his own opinion, therefore, that the treaty-making power extends even beyond the limits assigned by Mr. Justice Field it is not for the purpose of criticizing a practically *obiter* remark in the opinion of that Justice (for no such cession was under consideration) but to express his affirmative approval of the position taken by Chancellor Kent, that, undoubtedly, the United States has power to make a treaty ceding territory of a State, even without the consent of that State, although it might be an exercise of wise political discretion to obtain the consent of the State before doing so.

§ 427. **Cession of territory involved in the Northeastern Boundary settlement of 1842.**—We shall refer in the subsequent chapter[1] to the dispute over, and the settlement of, the

§ 426.

[1] For views of Chancellor Kent on this subject see § 474, *post*.

§ 427.

[1] See §§ 474 *et seq.*, *post*, for Northeastern boundary settlement.

Northeastern boundary, and the questions which were then raised as to the power of the United States to cede a portion of the State of Maine in that adjustment. Inasmuch, however, as the controversy was settled by diplomatic action, and with the consent of the States interested, no judicial decision was ever based thereon, and the legal propositions involved remained undecided, so far as the courts are concerned. In this chapter it is intended to refer to certain instances in which the treaty-making power has been exercised to its widest extent, and far beyond any prerogatives expressly stated in the Constitution, and, possibly, in direct contravention of constitutional limitations, but in which it has also been determined by the Supreme Court that it was properly exercised. After examining these specific instances, in which the treaty-making power has been exercised by the Executive and Legislative departments of the Government, it must be admitted that the United States Government cannot exceed its treaty-making power, unless it shall exercise it to a greater extent than has already and actually been done in these instances.

§ 428. **Detailed list of specific acts done under treaties impossible owing to number and variety.**—To examine all the treaties, three hundred and upwards in number, which have been negotiated by the United States since 1778, and to note all of the different subjects to which the treaty-making power has extended, and the manner in which those subjects have been handled, would be interesting and profitable, but it would be beyond the limits of this chapter and even of this book, although an attempt will be made to do so in an appendix;[1] the official compilations of treaties and the analytical and synoptical indices prepared by the State Department should be consulted by any one desiring to obtain this information in detail.[2]

§ 429. **State legislation as controlled by treaty stipulations.**—As already shown the regulation of the descent of

§ 428.

[1] See TREATIES APPENDIX at end of this volume which contains a list of the various treaties with foreign powers, and the subject-matter of existing treaties with references to where the treaty itself will be found in full.

For note 2 see p. 241.

property, a matter wholly within the local jurisdiction of the separate States, has been the subject of treaty negotia-

[2]NOTE ON COMPILATIONS OF TREATIES BETWEEN THE UNITED STATES AND FOREIGN POWERS.

CURRENT EDITIONS, 1889 AND 1899.

All the treaties and conventions, and many of the protocols or diplomatic agreements, of the United States with foreign nations, except postal conventions, will be found in English in the two following official volumes:

Treaties and Conventions concluded between the United States of America and other Powers, since July 4, 1776, compiled by John H. Haswell, containing notes, with references to negotiations preceding the several treaties, to the executive, legislative, or judicial construction of them, and to the causes of the abrogation of some of them; a chronological list of treaties; and an analytical index. Washington, Government Printing Office, 1889.

Compilation of Treaties in Force. Prepared under Act of July 7, 1898, by Henry L. Bryan. Washington, Government Printing Office, 1899.

U. S. STATUTES AT LARGE.

All of the above treaties, conventions and protocols, and also the postal conventions, between the United States and foreign nations will be found in all the languages in which they were respectively executed in:

The United States Statutes at Large. Volume 8 contains all treaties up to 1845, the others will be found in the various volumes at the date of, or shortly after, they were respectively proclaimed by the President.

OTHER OFFICIAL PUBLICATIONS.

The following are more or less complete collections of the treaties of the United States with foreign powers, compiled by authority of the government:

Treaties and conventions concluded between the United States of America and other powers, since July 4, 1776. Revised edition. Containing notes, with references to negotiations preceding the several treaties, to the executive, legislative, or judicial construction of them, and to the causes of the abrogation of some of them; an appendix showing the treaties concluded subsequently to those contained in the text, and a correction of errors and omissions; a chronological list of treaties; an analytical index; and a synoptical index. By J. C. Bancroft Davis, Washington, Government Printing Office, 1873.

For purposes of reference to treaties, etc., to March 3, 1851, see:

A synoptical index to the laws and treaties of the United States of America from March 4, 1789, to March 3, 1851, with references to the edition of the laws published by Bioren and Duane, and to the Statutes at Large, published by Little and Brown, under the authority of Congress. Prepared under the direction of the Secretary of the Senate. Boston, Charles C. Little and James Brown, 1852.

tion and stipulations, with the result that State laws in regard thereto have been declared inoperative, so far as they

Public treaties of the United States in force on the first day of December, 1873. Edited, printed and published under the authority of an act of Congress, and under the direction of the Secretary of State. Washington, Government Printing Office, 1875.

Treaties and conventions concluded between the United States of America and other powers since May 1, 1870. Not contained in Senate executive document No. 36, 41st Congress, 3d session, with some notes in reference thereto. By John L. Cadwalader. Washington, Government Printing Office, 1876.

Digest of the published opinions of the Attorneys-General, and of the leading decisions of the Federal Courts, with reference to international law, treaties and kindred subjects. By John L. Cadwalader. Washington, Government Printing Office, 1877.

For other government documents relating to treaties see preface and notes of Mr. Davis, in Mr. Haskell's edition of treaties and conventions, 1889.

The following volumes also contain much valuable matter on the subject of United States treaties:

Laws of the United States, including all laws passed after the adoption of the Constitution; the Declaration of Independence; the Articles of Confederation; the Constitution of the United States; Treaties and Conventions made between the United States and Foreign Nations; Indian treaties; and the acts, ordinances, or resolutions passed by the Continental Congress prior to the year 1789 that in any degree affected real property, the government of the territories, the organization of the great Executive Departments of the Government, etc., 1815, commonly called "Bioren & Duane's edition."

The American Diplomatic Code, embracing a collection of Treaties and Conventions between the United States and Foreign Powers, from 1778 to 1834, with an abstract of important judicial decisions, on points connected with our Foreign Relations. Also a concise Diplomatic Manual, containing a summary of the Law of Nations from the works of Wicquefert, Martens, Kent, Vattel, Ward, Story, etc., and other diplomatic writings on questions of International Law. Useful for public ministers and consuls, and for all others having official or commercial intercourse with foreign nations. By Jonathan Elliot. In two volumes. Washington, Jonathan Elliot, Junior. First edition 1827, second edition 1834.

A Digest of the Laws of the United States, including the Treaties with Foreign Powers, and an abstract of the judicial decisions relating to the Constitutional and Statutory Law. By Thomas F. Gordon. Philadelphia, Thomas Cowperthwait & Co. Four editions, 4th edition, 1852.

MOORE'S HISTORY OF ARBITRATION.

History and Digest of the International Arbitrations to which the United States has been a Party, together with Appendices containing

conflict with treaty provisions;[1] that condition, however, results from the fact that the United States, through the treaty-making power, directly controls State legislation pursuant to that clause in the Constitution which makes treaties the supreme law of the land;[2] in this chapter it is intended to refer to matters which are not within the jurisdiction of any State, but which affect the people of the United States in their relation to the Federal Government. Possibly in one instance, to wit: that of extradition, it may be said that the exclusive jurisdiction of States over the police power is involved. It is referred to now, however, as to the power of the United States to make and execute treaties, and their effect upon citizens of, or persons under the jurisdiction of, the United States, in which aspects it has not as yet been discussed.

§ 430. **Commercial regulations always the subject of treaties.**—Foreign and interstate commercial relations are, of course, regulated by the United States, and are properly, and without any question, the subject of negotiations, and are regulated, as a general rule, so far as friendly powers are concerned, by treaty stipulations. Clauses relating exclusively to commercial regulations, such as tariff, and tonnage, and to rules of belligerency, such as blockade, capture, right of search, etc., are admittedly within the scope of governmental regulation under, and pursuant to, the treaty-

the Treaties relating to such Arbitrations, and Historical and Legal Notes on other International Arbitrations, Ancient and Modern, and on the Domestic Commissions of the United States for the Adjustment of International Claims. By John Bassett Moore, Hamilton Fish Professor of International Law and Diplomacy, Columbia University, New York; Associate of the Institute of International Law; sometime Assistant Secretary of State of the United States; author of a work on Extradition and Interstate Rendition, of American notes on the Conflict of Laws, etc. In six volumes. Washington, Government Printing Office, 1898.

INDIAN TREATIES.

For Indian Treaties see note to section 405, p. 250, *ante*.

§ 429.

[1] See cases collated in §§ 324 *et seq.*, chap. XI, *ante*, and see also views of Pomeroy, Story and Iredell on this subject in §§ 266 *et seq.*, vol, I, pp. 405, *et seq.*

[2] Const. U. S., Art. VI, cl. 2.

making power; the treaty-making power is also supplemented in those cases by other general powers conferred on the Central Government by the Constitution in regard to the regulation of commerce and the management of the affairs of the United States with foreign nations.[1]

§ 431. **Six subjects to be considered in this chapter classified.**—In this chapter six classes of treaties, and cases affecting the same, will be considered, by which it will appear that the treaty-making power has been exercised to such a great extent that it must be practically unlimited. They will be considered in the following order.

First. Extradition treaties, in which provisions have been made for the Federal Government to surrender fugitives from justice to governments of foreign countries, although the persons surrendered are at the time within the jurisdiction of a State and have not committed any offence against the laws of the United States or of any of the States.[1]

Second. Treaties of cession, in which stipulations have been made in regard to the treatment of the inhabitants of the ceded territory, and which stipulations have been held to be paramount to all other laws.[2]

Third. Claims-conventions and other treaties, in which claims of citizens of the United States against foreign governments have been confiscated, satisfied and barred by the Central Government exercising the right of eminent domain.[3]

Fourth. Trade-marks conventions, in which notwithstanding the fact that Congress cannot protect trade-marks within the United States, except so far as such protection may be incidental to its power to regulate affairs with the Indian tribes, and commerce with foreign countries and between the States, as decided by the Supreme Court in the Trade-Mark Cases,[4] the trade-marks of American citizens are protected under the treaty-making power in foreign countries, and those

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[1] See Analytical Indexes of subject-matter of treaties in the treaty volumes referred to in note 2 to § 428, p. 241, *ante*, and also see TREATIES APPENDIX at end of this volume.

§ 431.

[1] See §§ 432, *et seq.*, *post*, pp. 245, *et seq.*, *post*.

[2] See §§ 438, *et seq.*, *post*, pp. 279, *et seq.*, *post*.

[3] See §§ 442, *et seq.*, *post*.

[4] *The Trade-Mark Cases*, U. S. Sup. Ct. 1879, 100 U. S. 82, MILLER, J.

of citizens of foreign countries are similarly protected throughout the whole domain of the United States.[5]

Fifth. Stipulations in treaties which have been made with foreign powers, giving their consuls jurisdiction in the United States over certain specified cases, which, in the absence of such stipulations, would be within the jurisdiction of Federal and State courts, and this notwithstanding the general rule that it is illegal for any foreign power to establish any court in the United States.[6]

Sixth. Treaties permitting the United States to establish Consular Courts administered by rules which are not necessarily in accordance with the provisions and the limitations of the Constitution of the United States and which have jurisdiction over American citizens in foreign lands.[7]

§ 432. **Wide extent of treaty-making power exercised in regard to Extradition, but from its frequent occurrence no longer a matter of comment.**—It has been said that treaties cannot provide for anything repugnant to the Constitution, but the Constitution provides that all powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people,[1] and certainly the exercise of the police power is reserved to the States. Officers of the United States, however, acting under United States statutes which are based exclusively upon treaty provisions, can arrest in, and extradite from, the territory of a State any person whom the Executive sees fit to deliver to a foreign power pursuant to stipulations in our treaties with that power.

The treaty-making power has been extended to its widest limits in extradition treaties, but so accustomed have the people become to its exercise in this particular form that the extradition of a fugitive from justice does not appear to be an extraordinary exhibition of power. It is only through the medium of the treaty-making power, however, that fugitives from justice, seeking an asylum in this country, can be sur-

[5] See §§ 446, *et seq.*, *post*, pp. 322, *et seq.*, *post.*

[6] See §§ 448, *et seq.*, *post*, pp. 329, *et seq.*, *post.*

[7] See §§ 450, *et seq.*, *post*, pp. 334, *et seq.*, *post.*

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[1] Const. U. S., Article X of Amendments.

rendered to the government of the foreign country whence they have escaped.[2]

[2] Chapter III of Spear on Extradition, pp. 26 to 41, is devoted to the consideration of the extent of the treaty power of the United States in connection with extradition treaties. Numerous notes are cited in regard to the effect of treaties upon the Bills of Rights as they existed in the States, and he says:

"Mr. Lawrence, in the letter above referred to, suggests the inquiry 'whether extradition, either with or without treaty, is consistent with *Magna Charta* or the bills of right, as incorporated into the organic laws of all the States of the Union, and which declare, in terms more or less precise, that no member of the State can be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or by the judgment of his peers.'

"The first remark in regard to this query is that the bills of rights, referred to, relate only to those who are citizens of a State, and, consequently, have no application to the extradition of persons who are not such citizens.

"A second remark is that whether the extradition of a citizen, under the stipulations and authority of a treaty, is or is not consistent with State bills of rights, is not a material question, since the Constitution makes all treaties of the United States a part of 'the supreme law of the land,' and, as such, superior to any State constitution or State law. It gives to the President the treaty power: and if he makes extradition treaties with the advice and consent of the Senate, and if such treaties are not repugnant to the Constitution itself, then they are a part of this 'supreme law.' Anything in State constitutions inconsistent therewith would not displace the authority and operation of these treaties, but the treaties would render such constitutions null and void to the extent of the inconsistency. The treaties would not yield to the constitutions, but the latter would yield to the former. (*Ware* vs. *Hylton*, 3 Dall. 199; *Owings* vs. *Norwood's Lessee*, 5 Cranch, 344; *Fairfax's Devisee* vs. *Hunter's Lessee*, 7 Cranch, 603; and *Worcester* vs. *The State of Georgia*, 6 Pet. 515.)

"A third remark is that the rights secured by State bills of rights in behalf of citizens have no relation whatever to the subject of extradition conducted and regulated by the authority of the United States. Such bills of rights are simply designed to protect the citizen against usurpations and abuses of power by State authority, and, hence, they furnish him no protection against any proceeding which is authorized by the Constitution of the United States. He cannot take an appeal from the latter to the former or supersede the latter by the former. The latter is 'the supreme law' as to his rights.

"Conclusion.—The conclusion, derivable from this survey of the subject, is that extradition treaties come fully within the scope of the treaty power as given to the President, subject to the qualification of the Senate's approval by the requisite majority, and that there is nothing in any part of the Constitution which excludes such treaties from

There is no statute of the United States,[3] or of any State,[4] providing for, or permitting, the extradition of, any citizen

the exercise of the power. The doctrine is well settled in this country that it is only through such treaties that extradition can be had at all. The whole question, therefore, as to extradition, as to the making of treaties for this purpose, as to the crimes that shall be enumerated, as to the terms upon which mutual delivery shall be granted, and as to the nations with which the treaties shall be made, is, by the Constitution, submitted to the sound discretion of the President, subject to the limitation imposed by the power of the Senate." Spear's Law of Extradition, pp. 38–39.

John Jay while Secretary of Foreign Affairs for the Confederation, and who afterwards performed the duties of Secretary of State of the United States pending the arrival of Thomas Jefferson, and who then became Chief Justice, in a report which is found in vol. 1 of the Diplomatic Correspondence of 1783–1789, page 113, and which is referred to at length in vol. 1, p. 25 of Moore on Extradition, considered that the question was a very serious one, and in the particular case held that the demand made by the French Government need not be acquiesced in because Longchamps, the fugitive in question, had committed a crime in the United States and was already in jail therefor; subsequently when the point was submitted to him as to whether the officers of the Confederation should make a demand upon Great Britain for a fugitive of the United States who had escaped into Canada he expressed his opinion that the United States would not be able to deliver up such an offender and thought that under the circumstances, as no reciprocal favor could be shown if the circumstances should be reversed, that the request should not be made.

[3] Extradition is now regulated in the United States by the Revised Statutes, all the laws which had been passed prior to 1878 having been incorporated into §§ 5720, *et seq.*, of the Revised Statutes. See marginal notes of Revised Statutes for prior statutes.

For the extradition laws as they existed up to June 6, 1900, and as amended on that day see opinion in *Neely* vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J., quoted in full in note A. to § 107, vol. I, pp. 178, *et seq.*

See also all of the laws relating to extradition collected in the first volume of Moore on Extradition in which the changes by amendments are carefully noted and explained and the cases involving construction of the statutes collected and annotated.

[4] Chapter III, of Moore Extradition, vol. I, is entitled, *Extradition a National Act.* The first paragraph is as follows:

"§ 44. *Constitutional doctrine in the United States.* It may be regarded as settled doctrine that, in the United States, the extradition of fugitives from the justice of foreign countries is a subject within the exclusive control of the national government, under its constitutional power of conducting foreign intercourse and of making treaties. The question has by no means been free from controversy, and has never been act-

of the United States to any foreign country in the absence of treaty provisions providing therefor, and it has been practically settled that the Executive of the United States has no power to deliver a fugitive from justice to a foreign government in the absence of such a statute or of treaty stipulations expressly providing for such surrender;[5] it has, however, been decided within the present year by the Supreme Court that Congress has the constitutional power to provide for the surrender of a fugitive from justice to the authorities of territory under the military occupation of the United States in the absence of a treaty stipulation.[6]

No effort will be made to cover the subject of extradition in the few sections and pages of this chapter which can be devoted to the subject. The power to enter into the treaty

ually decided by the Supreme Court of the United States. But, as the respective powers of the Federal and the State governments have in course of time been more clearly defined, there has been developed a general consensus of judicial and executive opinion that the States do not possess the power to surrender fugitive criminals to foreign governments. So that, if the question were actually to come before the Supreme Court for decision, the result could scarcely be regarded as doubtful." On page 75 Moore refers to the provisions in the treaty with Mexico of December 11, 1861, as being the only instance "in which the power has been conferred by the Federal government, either by law or by treaty, upon the authorities of a State or Territory of the United States, to practice extradition with foreign countries." (See Treaty for the Extradition of Criminals, from Justice, with Mexico, concluded December 11, 1861; ratifications exchanged May 20, 1862; proclaimed June 20, 1862. U. S. Treaties and Conventions, edition 1889, p. 698; U. S. Treaties in Force, edition 1899, p. 407.)

The laws which have at various times been passed by States in regard to extradition are there reviewed by Mr. Moore and cases cited under which fugitives were arrested; many of their laws were passed *in aid* of United States proceedings. For cases affecting New York and Vermont Statutes, see § 19, vol. I, of this work, pp. 34, *et seq.*; and cases there cited: *People ex rel. Barlow* vs. *Curtis*, N. Y. Ct. of Appeals, 1872, 50 N. Y. 321, CHURCH, Ch. J., and *Holmes* vs. *Jennison*, U. S. Sup. Ct. 1840, 14 Pet. 540; *Ex parte Holmes*, Sup. Ct. Vermont, 1840, 12 Vt. 631, WILLIAMS, Ch. J.

See also *In re Washburn*, N. Y. Ct. of Ch. 1819, 4 Johns. Ch. 106, KENT, Chan.

[5] See next section which is devoted to this branch of the subject.

[6] See the act of June 6, 1900, quoted at length in opinion in *Neely* vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J., and which is given in full as note A. to § 107, vol. I, pp. 178, *et seq.*

and to enforce it is the only branch of the subject which is properly within the scope of this work. The method of enforcing those treaties and the procedure thereunder must be found in the books which are exclusively devoted to that branch of international law;[7] in the succeeding sections and

[7] AUTHORITIES ON EXTRADITION.

MOORE ON EXTRADITION AND INTERSTATE RENDITION.

A Treatise on Extradition and Interstate Rendition. With Appendices containing the Treaties and Statutes relating to Extradition; the Treaties relating to the Desertion of Seamen; and the Statutes, Rules of Practice, and Forms, in force in the several States and Territories, relating to Interstate Rendition. By John Bassett Moore, Third Assistant Secretary of State of the United States; Author of a work on "Extra Territorial Crime," of a report on Extradition to the International American Conference, etc. In two volumes. Boston, The Boston Book Company, 1891.

SPEAR ON THE LAW OF EXTRADITION.

The Law of Extradition, International and Interstate. With an Appendix, containing the Extradition Treaties and Laws of the United States, the Extradition Laws of the States, several sections of the English Extradition Act of 1870, and the Opinion of Governor Cullom. By Samuel T. Spear, D. D., author of "The Law of the Federal Judiciary;" "The Constitutionality of the Legal Tender Acts," etc. Second edition. Albany, Weed, Parsons & Co., 1884.

WHARTON'S DIGEST OF INTERNATIONAL LAW.

Sections 268–282, vol. II, pp. 744–832, 2d edition, are devoted to the subject of extradition.

CLARK'S LAW OF EXTRADITION (English).

A Treatise upon the Law of Extradition. With the Conventions upon the Subject existing between England and Foreign Nations, and the Cases decided thereon. By Sir Edward Clarke, Knt., Her Majesty's Solicitor General; formerly Tancred Student of Lincoln's Inn. Third edition. London, Stevens and Haynes, 1888.

F. J. KIRCHNER; L'EXTRADITION (French): FUGITIVE OFFENDERS (English).

L'Extradition; Recueil Renfermant in extenso tous les Traités conclus jusqu'au 1er Janvier, 1883, entre les Nations Civilisées, et donnant la solution précise des difficultés qui peuvent surgir dans leur application; avec une préface de Me Georges Lachaud, avocat à la Cour D'Appel de Paris; Publié sous les auspices de M. C. E. Howard Vincent, Directeur des Affaires Criminelles de la Police Métropolitaine de Londres; Membre de la Faculté de Droit et de la Société Générale des Prison de Paris; avec le Concours Bienveillant du Corp Diplomatique, par F. J. Kirchner, Attaché à la Direction des Affaires Criminelles. London, Stevens and Sons, Chancery Lane, 1883.

Fugitive Offenders; Being the Law and Practice relating to Offenders

notes some of the leading decisions on the right of the United States to extradite fugitives from justice are cited.[8]

§ 433. Power of Executive to extradite without treaty. —The only instance in which the Executive has undertaken to extradite any person from this country, except in pursuance of treaty stipulations, was in 1864, when Secretary Seward, with the approbation of President Lincoln, surrendered to the Spanish authorities one Arguelles, a Cuban officer who was guilty of selling a number of people into slavery and appropriating the proceeds of sale to his own use.

The surrender was accomplished so expeditiously that the extradition could not be prevented by judicial proceedings; Congress, however, took notice of the matter; a resolution was introduced in the House of Representatives condemning the proceeding; Mr. Seward defended his course in a communication addressed to the Chairman of the Committee on the Judiciary; the resolution of censure was defeated. The House was politically in sympathy with the administration, however, and naturally desired to sustain it.

The general concensus of opinion as expressed by Professor Moore in his treatise on extradition is that, in the absence of treaty stipulations or act of Congress, there is no power in the Executive to extradite a person from this country to any other foreign country.[1]

flying to or from this country, including the Extradition Acts and Treaties. By F. J. Kirchner, London, 1882.

[8] Volume I, of Moore's Extradition, referred to in the foregoing note, contains all of the important American and English cases, both legal and diplomatic, and also the statutes, up to 1888 are properly classified and annotated. The current digests should be consulted for subsequent cases. See U. S. Rev. Statutes § 5270, *et seq.*, for statutory provisions in regard to extradition; consult marginal notes for prior statutes.

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[1] "Sec. 15. Domestic Authority. It is laid down by Foelix, that 'according to national usage, extraditions are generally granted, even without treaty.' This statement assumes that authority exists in the government, in the absence of a treaty, to make the surrender. As we shall see further on, it is more than doubtful whether such authority is vested in any branch of the government either in the United States or in Great Britian. In France and in other countries in which extradition is entirely within the control of the executive, fugitives may be surrendered in the absence of a treaty, or, in case a treaty exists, for

The account of the Arguelles case, as it has been reported in Works on international law,[2] and, as quoted in Mr. Beck's

offences not included in it. But, as a rule, reciprocity, is strictly required." Moore on Extradition, p. 20, vol. 1.

"In considering the surrender of fugitives from justice, in the absence of a treaty, the question arises whether the government upon which a demand for extradition is made possesses the legal authority to grant it. This is a question of constitutional law, and in the United States the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or a legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Moore on Extradition, vol. 1, p. 21. See also the numerous references to diplomatic correspondence in the foot note.

The opinion of Mr. Jefferson on this subject is that the fugitive could not be surrendered. As Secretary of State in a letter to the President, dated November 17, 1791, he expressed his opinion that it should not be done in the absence of a convention.

The letter, or rather the report, is found on page 22, vol. 1, of Moore's Extradition.

[2] SPEAR ON THE ARGUELLES CASE.

"The question of international extradition has frequently come before the courts of this country; and, with a single exception, the opinions expressed are unanimous to the effect that there is no obligation to surrender fugitive criminals, except as provided for by treaty stipulations. . . . The preponderance of authority derived from practice, the legislation of Congress, the opinions of the Attorney Generals of the United States, and the deliverances of the judiciary, both State and Federal, clearly shows that no department of the general government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the government are bestowed by the Constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to Congress, or among those to the executive department, or among the powers given to the Federal judiciary. There can be no discretion in the exercise of the power, since it does not exist at all.

"The delivery of Arguelles, being wholly without any legal authority, was not at all excusable by the fact that the alleged fugitive was supposed to be guilty of a heinous offense. This supposition, if true, does not change the principle or the nature of the act. Rules of law do not vary with the merits or demerits of the particular case to which they are applied. Lynching men for murder, not being the method prescribed by law for killing murderers, is itself an act of murder.

"So the forcible seizure of a person and the delivery of him to the agent or agents of another government, to be removed from the jurisdiction and protection of the laws of this country, and to be tried for a

brief in the *Neely Case*, will be found in the note appended to this section,[3] as well as some decisions bearing on the gen-

crime or crimes committed elsewhere, unless authorized and provided for by a treaty, can have no other legal character than that of official kidnapping. The action of the executive branch of the government, in the case of Arguelles, was an enormous usurpation of power, and, as a precedent, is one of the very worst in our whole history. It ought to have called forth the most unqualified protest on the part of Congress.

"The theory that any person, peacefully coming within the jurisdiction of our laws, and committing no offense against them, may, in the absence of any treaty or law of Congress authorizing his extradition on the charge of crime made by a foreign government, be denied the right of unmolested asylum at the discretion of the President of the United States, assigns to his office the prerogatives of an absolute despot. Such was the theory put in practice with reference to Arguelles.

"We have selected this case, not on account of the man himself, but on account of the principle involved in it, and especially for the purpose of considering the question whether the general government, independently of treaties, is clothed with the power of international extradition, and also whether such extradition on the simple basis of the law of nations has any legal standing among the American people. The preponderance of authority is overwhelmingly against the idea.

"Secretary Seward, in his answer to the resolution of the Senate, remarked that no nation is 'bound to furnish asylum to dangerous criminals who are offenders against the human race.' This is true, yet it has no relation to the question whether the arrest and delivery of Arguelles were legally justifiable. The President of the United States is not clothed with the total sovereignty of the United States, but is simply the executive authority thereof, and, as such, limited in his powers and duties by the Constitution and laws of the United States, and cannot lawfully exercise any power with which he is not thus invested. The policy of the United States as to the extradition of fugitive criminals is not to be settled by an executive act, without the warrant of a treaty, or any law of Congress authorizing the act." Spear's Law of Extradition, pp. 10, 13–14.

[3] MR. BECK ON THE ARGUELLES CASE.

"The facts in this case were that on April 5, 1864, the minister of Spain addressed a note to the Secretary of State, informing him that one Jose Arguelles had escaped from the island of Cuba under the charge of having sold into slavery a large number of recaptured African slaves, and had taken refuge in New York. The minister therefore asked that Arguelles might be delivered up to the Government of Spain, 'not upon the ground of a right to demand it, but as an act of comity in the interest of justice and humanity.' (Letter of Secretary Seward to chairman of the Committee on the Judiciary, House of Representatives, Diplomatic Correspondence, 1864, part 4, p. 37.) By direction of the Presi-

eral question of how far extradition is limited to the surrender of fugitives pursuant to treaty stipulations.[4]

dent, Arguelles was seized in New York and delivered to the Spanish authorities for trial in Habana. When this became known a resolution was introduced in the House of Representatives, condemning the action of the Executive. Mr. Seward defended his course in a lengthy and forcible communication addressed to the chairman of the Committee on the Judiciary, to which reference will presently be made. Once again the legislative branch of the Government affirmed the present contention of the Government, for as in the case of Robbins, when the House, by a large majority, accepted the view of Marshall as to President Adams's power, so in the *Arguelles* case the House accepted the contention of Secretary Seward and defeated the resolution of censure. In the Senate a resolution was adopted requesting information, and on June 1, 1864, President Lincoln transmitted to the Senate, Secretary Seward's report, which said:

"'There being no treaty of extradition between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in the case referred to in the resolution of the Senate is understood by this Department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity toward a foreign government by surrendering, at its request, one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender on a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and it is believed that if, in any case, the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise.'

"Secretary Seward's communication to the House of Representatives constitutes a powerful argument for the power of the Executive to extradite in the absence of either treaty or Congressional enactment. It is as strong in reason as it is eloquent in diction. It bears with striking force upon the present contention, for, if the executive department of the Government may extradite as an act of sovereign power, independent of treaty or statutory enactment, *a fortiori* it can extradite when authorized, empowered, and directed by Congress so to do.

"Mr. Seward reviews the opinions of learned writers on international law and the decisions of the courts, to which reference has already been made in this brief. He concludes that 'upon the plainest reason and a uniform concurrence of authority, that the United States, in its relations to foreign nations, certainly possesses the authority to surrender to the pursuing justice of a foreign state a fugitive criminal found within our territory.'

[4] For note 4 see p. 254.

How far the Executive has a right to surrender a deserter to a foreign government under the general rules of comity

"As to the alleged right of asylum in this country in the absence of treaty regulations for extradition, Mr. Seward's reasoning is especially forcible. He says:

"'That the practice of civilized nations, and especially of this country, has maintained this privilege of asylum, and that this nation at least would consider its honor engaged to vindicate it, no one will be disposed to deny. This privilege is understood to embrace refugees from personal oppression and from the consequences of political offenses. But no civilized nation, and our own as little as any, has included within this privilege criminals guilty of crimes prescribed by nature and humanity. In these cases, to afford protection against pursuing justice is an offense against humanity and against our own society. Mr. Wirt, in a passage already quoted, draws the distinction with force and precision. In speaking of the case of the criminals before him, he says their surrender "would violate no claim which these fugitives have on us. Humanity requires us to afford an asylum to the unfortunate, but not to furnish a place of refuge to the guilty. On the other hand, respect for ourselves and a prudent regard for the purity of our society admonish us to repel rather than invite the admixture of foreign turpitude and contamination.'

"Mr. Seward concludes his forcible vindication of his position by saying:

"'Upon these considerations, then, it would seem that the action of the President of the United States, in directing the extradition of Arguelles upon the application of the Government of Spain, was in pursuance of a national authority, sanctioned by the law of nations; was in exercise of an executive function belonging to his office under the Constitution; was not in derogation of any right of asylum; was a just recognition of our relations with a friendly power; was conformed to the cherished policy of this country for the extinction of the traffic in slaves, and was an obligation to justice and humanity which could not have been withheld.'

"All of which might with almost equal propriety be applied to the case at bar." Extracts from brief James M. Beck, Ass't Atty. Gen'l of United States in *Neely* vs. *Henkel*.

[4] *United States* vs. *Davis*, U. S. C. C. Mass. 1837, 2 Sumner, 482, STORY, J. The master of an American whaling ship while lying in the harbor of one of the Sandwich Islands shot and killed a man on the schooner attached to the whaling vessel, but which belonged to residents of the island. On trial in the United States court it was held that the crimes act of 1790 only gave jurisdiction when the crime was committed on the high seas, and that the offence was committed not on the whaling ship, but on the schooner, and therefore was within the scope of the local authorities. The suggestion being made that the prisoner should be remanded to the Governor of the Sandwich Islands for trial, Mr. Justice Story said that he had never known of any such authority exercised by our courts.

and of international law is involved in a case now pending before the Supreme Court.[5] Other cases on this subject are cited in the notes.

Chancellor Kent, however, believed that the power existed as was evidenced in his decision in 1819.

In re Washburn, N. Y. Ct. Chan. 1819, 4 Johns. Chan. 106, KENT, Chan. This was one of the earliest extradition cases and was decided by the Chancellor not so much upon any treaty stipulations or government action as upon his conception of the then existing general law of nations:

The points decided as stated in the syllabus are as follows:

"It is the law and usage of nations to deliver up offenders charged with felony and other high crimes, and who have fled from the country in which the crimes were committed, into a foreign and friendly jurisdiction.

"And it is the duty of the civil magistrate to commit such fugitive from justice, to the end, that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make application to the proper authorities here for his surrender. But if no such application is made in a reasonable time, the prisoner will be entitled to his discharge.

"The evidence to detain such fugitive from justice, for the purpose of surrendering him to his government, must be such as would be sufficient to commit the party for trial, if the crime had been perpetrated here.

"The 27th article of the treaty of 1795, between the United States and Great Britain, was merely declaratory of the law of nations on this subject; and since the expiration of that treaty, the principles of the general law of nations remain obligatory on the two nations.

"Therefore, the chancellor, or a judge in vacation, has jurisdiction to examine a prisoner before him on *habeas corpus*, and who has been taken in custody on a charge of theft, or felony, committed in *Canada*, or a foreign state, from which he has fled; and if sufficient evidence appears against him, to remand him, or if there is not sufficient proof to justify his detention, to discharge him."

While the Chancellor maintained that the court had jurisdiction to hold him, the prisoner was discharged for want of evidence, and it is stated that the discharge was upon that ground alone.

Dos Santos, Ex parte, U. S. Cir. Ct. Virginia, 1835, 2 Brock. 493; s. c. Fed. Cas. 4016, BARBOUR, J. This was one of the early extradition cases in which the request was made by Portugal that we surrender a criminal.

There was no treaty; the question came up whether the United States was under any obligation to deliver the prisoner in the absence of any treaty stipulations and the court held that, as to the government, there was no obligation. The court then discussed the question of whether there was any power on the part of the judiciary to act in relation to this demand, and in holding that it had no such power the opinion in conclusion says (page 513):

"The second question is, whether the judicial officers of the United

[5] For note 5 see p. 256.

§ 434. **Power of Executive to extradite under treaty but without legislation.**—When, however, there is a treaty between the United States and a foreign government, the Executive has power to surrender a fugitive to a foreign gov-

States have any authority to act in relation to it? Perhaps the conclusion at which I have arrived on the first point, might render a decision and discussion of the other unnecessary; but as it was argued, and has been considered, and as I may have fallen into error on the first point, I will very briefly notice it. As a general proposition, the judicial power of a government is created for the purpose of executing *its own laws*. If in deciding upon a foreign contract, the courts of another country construe it according to the law of the place where made, and intended to be executed; as, for example, to give the interest there allowed, this is not the execution of a foreign law; but of the law of the court, which as to this case, adjudges that as the intention of the parties. As to criminal laws, I believe it is settled everywhere that one country will not execute the penal laws of another; not even its revenue laws. So far is this carried in this country, that the courts of one state will not execute the penal laws, either of a sister-state, or of the federal government. . . .

"In conclusion, I will say, that the counsel who made this application, has presented it in the strongest light, which the principles of public law or the authorities enabled him to do; yet, after the best reflection which I have been able to bestow upon the subject, in the short time which I have had to consider it, I am of opinion, that, without a treaty stipulation, this government is not under any obligation to surrender a fugitive from justice, to another government, for trial; and that, as a judicial officer of the United States, I have no authority whatsoever, either to arrest or detain, with a view to such surrender. It follows, as a consequence, that the prisoner is entitled to his discharge; and he is discharged accordingly."

[6] *United States ex rel. Alexandroff* vs. *Motherwell, Keeper of the Philadelphia County Prison, etc.*, U. S. Dist. Ct. E. D. Penna. 1900, 103 Fed. Rep. 198, McPherson, J., affirmed on appeal U. S. Cir. Ct. App. Third Cir., 107 Fed. Rep. 437, 1901, Dallas, J., and Gray, J., Bradford, J., dissenting. An appeal is now pending in United States Supreme Court. In this case the relator who was alleged to be a deserter from the Russian Naval Service was released from custody on the ground that the vessel (Russian cruiser Variag in process of construction in Cramp's shipyards, Philadelphia,) from which he was declared to have deserted was not completed and, therefore, did not come within the definition of vessel as used in the treaty of 1832 with Russia. It was held that an unfinished vessel might never acquire the character of an actual vessel and that until finished the relator could not be a member of the crew of such a vessel.

This decision was affirmed by the Circuit Court of Appeals but a new demand was then brought forward by the Russian government, at whose instance the proceedings were brought, to wit: that the per-

ernment, although Congress has not passed any legislation to make the treaty effectual.

Cases of this nature now rarely arise, as the general acts passed by Congress apply to all treaties of extradition,[1] whether made prior to the date of the statute or subsequently thereto. Before the statute was enacted, however, that question arose on more than one occasion; and on *habeas corpus* proceedings persons held for extradition claimed that the treaty on which their surrender was sought had not become operative because Congress had failed to enact the legislation necessary to carry it into effect.

The most notable instance in this respect was the famous *Nash alias Robins* case,[2] in which President Adams surren-

mission, given by the Executive departments of the United States Government to Russia, to land a company of men who were subsequently to become the crew of the Variag, then being built for the Russian government, was equivalent to permission of an armed force to cross the territory, and that under the rules of international law, jurisdiction over the force remained exclusively in the officers of the army to which permission is given, and that international comity permits and requires the surrender of deserters.

One of the justices at the Circuit Court of Appeals held that this view was tenable and the case is now before the Supreme Court of the United States and has been advanced for an early hearing (October, 1901). In the Supreme Court the case appears *sub nomine Tucker* vs. *The United States of America ex rel. Leo Alexandroff*. On motion made by the counsel for the Russian government the Supreme Court permitted the correspondence of the State and Treasury Departments to be printed as a part of the record in this case, although the same had not been produced in evidence in the lower courts.

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[1] See note 3 under § 432, p. 247, *ante*, for statutory provisions in regard to extradition.

[2] *United States* vs. *Nash, alias Robins*, U. S. Dist. Ct. So. Car. (about) 1799, Bee's Admr. 266, BEE, J.; Fed. Cas., 10,175.

The statement of the case in Bee's Admiralty is very brief, and is as follows (p. 266):

"The prisoner is brought before me by writ of habeas corpus, from which, and from two affidavits filed with the clerk of this court, it appears that the prisoner is charged with having committed murder on board of a ship of war belonging to his Britannic majesty, on the high seas. Requisition has been made by the British minister that he be delivered up by virtue of the 27th article of the treaty of amity between the *United States* and *Great Britain*; and as there is sufficient evidence of criminality to justify his apprehension and commitment for trial, and justice may be more fully done if the prisoner be tried where the witnesses reside,

dered one Nash *alias* Robins, an alleged murderer, and deserter from a British man-of-war, to the British authorities under the extradition provisions in the treaty of 1794. It was purely an executive act as no legislation had been enacted. The surrender was made and the alleged deserter was hanged. Political feeling ran very high at that time, and the action was exceedingly unpopular; the matter subsequently became the subject of a debate in Congress in which John Marshall, then a member of the House of Representatives, took part; it is said that his able defense of the President in this case was the basis of his subsequent appointment as Chief Justice of the United States, the centennial of which was so fittingly celebrated on the fourth of February, 1901. The author does not altogether credit the truth of this statement, but if it be true, then surely the life, desertion and death of Nash *alias* Robins was not all in vain. The same question which was discussed in the *Robins* case has subsequently been decided by the courts, notably in the case cited in a previous chapter in which Justice Levi Woodbury in 1845 remanded the prisoners for delivery, refusing to intervene on their behalf, holding that the provisions of the treaty with Great Britain of 1842 were self-operating, and that although Congress had not enacted any legislation as to the procedure for delivery of fugitives pursuant thereto, the provisions of the treaty were sufficiently explicit to enable the Executive Department to act thereunder.[3]

or their evidence may be better procured, I do (in consideration of the circumstances, and at the particular request of the President of the *United States* [*Mr. John Adams*], order that the prisoner *Thomas Nash* alias *Jonathan Robins*, be delivered over by the marshal of this court to *Benjamin Moodie*, consul of his Britannic majesty, agreeably to the 27th section of the treaty aforesaid."

The report of this case is followed by a full abstract of the speech of John Marshall, afterwards Chief Justice, which was delivered in the House of Representatives, in regard to the surrender of Robins.

This case also appears under the title of *United States* vs. *Robins* and is reported at great length in Fed. Cas. 16,175.

Following the opinion of the Justice and the speech of Mr. Marshall, there are seventy-one columns of speeches, pamphlets, etc., of the current literature of the day in regard to this case.

[3] *The British Prisoners*, U. S. Cir.

§ 435. **Power of Congress to extradite in absence of treaty.**—A third question in regard to the power of the Government in extradition cases is whether, under congressional legislation, a fugitive from justice can be extradited from the United States to a country with which this Government has no treaty relations.

This point has never been decided, as no statute has ever been passed providing for the extradition of a fugitive under such circumstances. The question will permit of a great deal of discussion, but it would necessarily be more or less academic, as the practical case does not exist and it is impossible to discuss the effect or legality of a prospective statute, the exact form and nature of which is necessarily unknown. It has been held that under the general powers and attributes of sovereignty the United States has power to expel, exclude and deport aliens;[1] this rule, however, might not be

Ct. Mass. 1845, 1 Wood. & Min. 66, WOODBURY, J. Also reported *sub nomine In re Thomas Sheazle*, See extracts from opinion in this case in § 374, p. 79, *ante*.

In re Metzger, U. S. Dist. Ct. S. D. N. Y. 1847, Fed. Cas. 9511. BETTS, J. N. Y. Sup. Ct. 1847, 1 Barbour, 248, EDMONDS, J. U. S. Sup. Ct. 1847, 5 Howard 176, MCLEAN, J. See § 374, n. 3, p. 81, *ante*.

In re Kaine, U. S. Sup. Ct. 1852, 14 Howard, 103. This was one of the first cases argued in the Supreme Court as to the power of the court to review by *habeas corpus* the proceedings of a United States Commissioner committing a prisoner for surrender. The court was divided and no decision was made. Writ denied. There were also three writs of *habeas corpus* which were heard in the Circuit and District Court and reported in Fed. Cas. 7597, 7597*a*, and 7598.

Other cases on the necessity of some statutory enactment and compliance therewith, will be found collated in Moore on Extradition and Spear on Extradition, under appropriate headings.

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[1] See alien law of 1798, 1 U. S. Stat. at L. p. 570, and the Chinese exclusion and deportation laws cited under § 379, pp. 91, *et seq.*, *ante*.

Ekiu vs. *United States*, U. S. Sup. Ct. 1891, 142 U. S. 651, GRAY, J., and see extract from opinion in note 3 *c*, to § 379, pp. 97, *et seq.*, *ante*.

Fong Yue Ting vs. *United States*, U. S. Sup. Ct. 1893, 149 U. S. 698, GRAY, J. See extracts from opinion in this case, in note 3 *e*, to § 379, pp. 103, *et seq.*, *ante*.

Lem Moon Sing vs. *United States*, U. S. Sup. Ct. 1895, 158 U. S. 538, HARLAN, J.

Wong Wing vs. *United States*, U. S. Sup. Ct. 1896, 163 U. S. 228, SHIRAS, J.

United States vs. *Yong Yew*, U. S. Dist. Ct. Missouri, 1897, 83 Fed. Rep. 832, ADAMS, J.

extended to permit the surrender of alien fugitives to another government for punishment. It certainly does not apply to citizens. The *Neely* case referred to in a previous chapter and decided in January, 1901,[2] sustains the right of Congress to enact legislation for the extradition of fugitives from the United States to territory occupied by the military forces of the United States. The act of June 6, 1900,[3] which is cited at length in the opinion in that case, provides for extradition in such cases, and under it Neely, who is charged with violations of the postal laws of Cuba, as they are now in force under our military occupation, was arrested; while awaiting extradition he applied to the United States Circuit Court for a writ of *habeas corpus*, but Judge Lacombe remanded him holding that Congress had power to pass such a statute.[4]

The Supreme Court in affirming this order, confined its decision exclusively to the point involved, to wit: that Congress had the power to extradite a person from one of the States of the Union to territory occupied by the military forces of the United States. The position of the United States Government on this question was sustained in the decision, which is given at length in the notes to a previous section. The fact that Congress has power to pass such an act does not affect the general question, as the territory specified is, during military occupation, exclusively under the control and jurisdiction of the United States so far as all foreign powers are concerned; and no treaty relations as to extradition can possibly exist. Unless, therefore, Congress can pass such an act no extradition could be effected under any circumstances, and this country would become an asylum for criminals escaping from a country over which no government other than that of the United States has jurisdiction. While the policy of the United States is against indiscriminate surrender of persons who have sought shelter

[2] *Neely* vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J., and see opinion in full in note A. to § 107, vol. 1, pp. 178, *et seq.*

[3] The act of June 6, 1900, 31 U. S. Stat. at L. p. 656, is quoted at length in the opinion in *Neely* vs. *Henkel*, and in vol. 1, of this work, pp. 178, *et seq.*

[4] *Neely In re*, U. S. Cir. Ct. S. D. N. Y., 1900, 103 Fed. Rep. 626 and 631, LACOMBE, J.

in our country, it certainly possesses sufficient power to do so in regard to territory under its own jurisdiction and control.

§ 436. **Rights of persons held for extradition from the United States.**—The questions which are constantly arising under extradition proceedings naturally divide themselves into two classes. *First.* Those which affect persons whose surrender is asked by foreign governments *from* the United States. *Second.* Those which affect persons brought to the United States from foreign countries. The first class will be referred to in this section and the second class in the succeeding section; in both instances the discussion will be confined to the law as it is administered in our own courts.

Extradition treaties, or provisions for extradition in general treaties, operate in a direct manner; persons held for surrender thereunder are entitled to the protection and benefits of the treaties equally with the requesting government.

Whether Congress has or has not the power to extradite in the absence of treaty it has been settled that where a treaty does exist no person can be extradited except in pursuance of its terms, and in case any person is to be surrendered for any offence, or in any manner not in accord with the treaty, the courts will release him on *habeas corpus* or *certiorari* proceedings. In England the rights of the prisoner are protected to the extent that no surrender can be made for fifteen days after the arrest, so as to enable the prisoner to institute *habeas* proceedings if he desires to do so.[1]

The person extradited has no right to demand a jury trial here as to question of his guilt or to be guaranteed a jury trial by the government to which he is surrendered,[2] and he can be surrendered under a law passed after the alleged offence was committed;[3] he cannot be released as a matter of right on bail pending the inquiry.[4]

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[1] The Extradition Act, 33 and 34 Victoria (9th August, 1870), § 11, and see full abstract in vol. 1, Moore on Extradition, pp. 741, *et seq.*

[2] *Neely* vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J.; and see opinion in full pp. 178, *et seq.*, (p. 186) vol. I.

[3] *In re Vandervelpen*, U. S. Cir. Ct. S. D. N. Y. 1877, 14 Blatchf. 137, Fed. Cases, 16,844, JOHNSON, J. *Held* that a prisoner could be extradited for crime committed prior to

[4] For note 4 see p. 262.

The evidence must make out a *prima facie* case that the crime referred to in the requisition has been committed and that it is one of the crimes specified in the treaty.

The determination of the examining officer is as a general rule final as to evidence, but may be revised as to form and procedure.[5] These questions, however, are beyond the scope

the ratification of the treaty, but subsequent to its conclusion; other points of practice discussed, and prisoner held. Treaty with Belgium of 1874.

[4] *In re Carrier*, U. S. Dist. Ct. Colo., 1893, 57 Fed. Rep. 578, HALLETT, J. *Held* that the prisoner remanded could not be admitted to bail and that there was no right under proceedings for extradition to demand that the prisoner could be admitted to bail.

The extradition acts of 1789, 1848 and 1882 were all considered in this action, and the judge held that it was not a question of whether larceny was bailable at common law, but whether it was so under the statutes, and held that it was "the intention of Congress to regulate all proceedings in extradition by special act, leaving nothing of substance to be borrowed from the general course of criminal procedure. Inasmuch as there is not in the act of 1848 or in any of the amendatory acts any provision for bail pending a hearing, under those acts the decision of the commissioner seems to have been correct, and the writ will be refused."

[5] The leading cases in the Supreme Court on the points mentioned in this section are:

In re Luis Oteiza y Cortes, U. S. Sup. Ct. 1890, 136 U. S. 330, BLATCHFORD, J., affirming *In re Cortes*, U. S. Cir. Ct. S. D. N. Y. 1890, 42 Fed. Rep. 47, LACOMBE, J. Points of procedure and practice and evidence settled. *Benson* vs. *McMahon*, 127 U. S. 457, followed.

Benson vs. *McMahon*, U. S. Sup. Ct. 1888, 127 U. S. 457, MILLER, J., affirming *In re Benson*, U. S. Cir. Ct. S. D. N. Y. 1888, 34 Fed. Rep. 649, LACOMBE, J. Forgery defined and construction of extradition provisions in treaty with Mexico of 1861.

Neely vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J., and see entire opinion quoted in note A. to § 107, vol. I, pp. 178, *et seq.*

Other cases involving the same points are:

In re Behrendt, U. S. Dist. Ct. S. D. N. Y. 1884, 23 Blatchf. 40. BROWN, J. Extradition proceedings held sufficient and prisoner remanded.

In re Breen, U. S. Cir. Ct. S. D. N. Y. 1896, 73 Fed. Rep. 458, LACOMBE, J. Procedure and proof.

In re Bryant, U. S. Cir. Ct. S. D. N. Y. 1897, 80 Fed. Rep. 282, LACOMBE, J. (affirmed U. S. Sup. Ct. 1897, 167 U. S. 104, BROWN, J.). Forgery, larceny, embezzlement, defined. Sufficiency of evidence. Prisoner remanded.

In re Charleston, U. S. Dist. Ct. Minn. 1888, 34 Fed. Rep. 531, NELSON, J. Proceedings of commissioner holding a prisoner arrested for extradition under treaty with Great Britain sustained. Certificates of consul to deposition held sufficient.

Cook vs. *Hart*, U. S. Sup. Ct. 1892, 146 U. S. 183, BROWN, J.

of this book and the cases cited in the notes are only a few of the many decisions which can be found by examining the authorities cited and the digests. Extradition is so essentially one of those questions in which the safety of the Union is involved that in a conflict between Federal and State juris-

In re Cross, U. S. Dist. Ct. N. C. 1890, 43 Fed. Rep. 517, SEYMOUR, J.

Castro vs. *De Uriarte*, U. S. Dist. Ct. S. D. N. Y. 1832, 12 Fed. Rep. 250, and 1883, 16 Fed. Rep. 93, BROWN, J. Defendant's demurrer overruled where plaintiff sued Spanish Consul in New York for false imprisonment alleging that extradition proceedings had been instituted maliciously. Subsequently the case was tried and verdict directed for defendant. A motion for new trial was denied. It was held that it was necessary for a public officer to act (16 Fed. Rep 101).

In regard to the question of time when the offence was committed the opinion says on page 100:

"The treaty provided that it should not apply to any offense committed before its date, that is, 1877. In this exigency, the defendant, being informed by the commissioner that the precise date of the offense was immaterial, provided that it were within the period of the treaty, it was considered under the telegram for extradition that the offense was undoubtedly committed within the treaty period, and probably about the time of his escape; and the complaint was accordingly written out upon information and belief, stating that the time of the offense was on or about September 25, 1881."

The judge did not consider that malice had been proved, and held that, even where the crime was not proved "under the circumstances, where immediate action on his part was demanded, that the offense for which he was required to procure extradition was committed within the period of the treaty; that under such instructions and such telegrams, not only was this probable, but the contrary was highly improbable; and that had he suffered the accused to escape through a failure to proceed upon the possible but improbable contingency that the date of the offense was prior to the treaty, he would have been justly subject to the charge of negligence of official duty had the crime been committed within the treaty period. As that was the only reasonable inference under the circumstances, the complaint was not without probable cause, as it was also without malice."

In re De Giacomo (surnamed *Cisarielo*) U. S. Cir. Ct. S. D. N. Y. 1874, 12 Blatchf. 391, BLATCHFORD, J. *Held*, that clauses in the extradition treaty with Italy of 1868 would not be considered as an *ex post facto* law so long as they related to the surrender of fugitives for crimes committed prior to the treaty.

In re Farez (*No. 1*), U. S. Dist. Ct. S. D. N. Y. 1869, 7 Blatchf. 34, Fed. Cas. 4644, BLATCHFORD, J.

In re Farez (*No. 2*), U. S. Dist. Ct. S. D. N. Y., 1870, 7 Blatchf. 345, Fed. Cas. 4645, BLATCHFORD, J.

In re Farez (*No. 3*), U. S. Dist. Ct. S. D. N. Y. 1870, 7 Blatchf. 491, Fed. Cas. 4646, WOODRUFF, J. General rules of procedure and

diction the authority of the Federal officers will be sustained.[6] The uniform rule adopted by the United States, and in fact by

evidence discussed; prisoner permitted to have additional examination and afterwards remanded.

In re Ferrelle, U. S. Cir. Ct. S. D. N. Y. 1886, 28 Fed. Rep. 878, BROWN, J. *Held*, that only a foreign country and not an individual can institute proceedings for extradition.

In re George Fowler, U. S. Dist. Ct. S. D. N. Y. 1880, 18 Blatchf. 430, BLATCHFORD, J. Points of procedure and evidence settled; prisoner remanded.

In re Henrich, U. S. Dist. Ct. S. D. N. Y. 1867, 5 Blatchford, 414, Fed. Cases, 6360, SHIPMAN, J. Points of procedure and practice settled; prisoner remanded.

In re Herris, U. S. Dist. Ct. Minn. 1887, 32 Fed. Rep. 583, NELSON, J. Reversed U. S. Cir. Ct. Minn. 1887, 33 Fed. Rep. 165, BREWER, J. Questions of practice, procedure, and as to who is authorized to institute proceedings, discussed and settled.

Ex parte Hibbs, U. S. Dist. Ct. Ore. 1886, 26 Fed. Rep. 421, DEADY, J. Questions as to definition of forgery and points of practice and jurisdiction settled.

In re Kelly, U. S. Dist. Ct. Minn. 1885, 25 Fed. Rep. 268, NELSON, J. Points of procedure, evidence and practice reviewed and prisoner discharged, but see same case, 1886, 26 Fed. Rep. 852, BREWER, J., when prisoner was held on second examination after re-arrest, objections as to second examination being overruled. Also held (26 Fed. Rep.) that the authority of a party representing a foreign government is a matter to be inquired into before the Commissioner, and any person whom the foreign government authorizes is a proper person to appear and prosecute.

In re Krojanker, U. S. Cir. Ct. S. D. N. Y. 1890, 44 Fed. Rep. 482, LACOMBE, J. Prisoners held on the evidence and remanded for extradition.

Ex parte Lane, U. S. Dist. Ct. Mich. 1881, 6 Fed. Rep. 34, BROWN, J. Practice points, procedure, evidence, questions of information and belief, passed upon and prisoner discharged.

In re Ludwig, U. S. Cir. Ct. S. D. N. Y. 1887, 32 Fed. Rep. 774, LACOMBE, J. "*Held*. that it is within the discretion of the Commissioner to adjourn the hearing of extradition proceedings on motion of the sovereignty making the demand for the accused, and the prisoner is not entitled to be discharged from custody on *habeas corpus* on the ground that the adjournment is unreasonably long, unless it is made to appear that the Commissioner has abused his discretion." Citing *Re MacDonnell*, 11 Blatchf. 100.

Ex parte McCabe, U. S. Dist. Ct. Tex. 1891, 46 Fed. Rep. 363, MAXEY, J. An American female citizen arrested on extradition proceedings in Texas and held for extradition on the request of the Mexican government, was discharged on the ground that the warrant had not been legally issued as to some points of practice, but the District Judge went further and held that the prisoner should also be discharged on the ground that under

[6] For note 6 see p. 267.

nearly all nations is not to extradite persons charged with political offences, and the surrender will be refused if it appears that the offence charged is of a political nature.[7]

the treaty she should not be delivered for extradition because she was an American citizen and the treaty contained the clause "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulation of this treaty."

In re MacDonnell, U. S. Cir. Ct. S. D. N. Y. 1873, 11 Blatchf. 79, 170; Fed. Cas. 8771, 8772, WOODRUFF, J. Points of practice, burden of proof, conflict of State and Federal Court, sufficiency of evidence passed on; prisoner on first proceeding remanded and subsequently discharged.

In re McPhun, U. S. Cir. Ct. S. D. N. Y. 1887, 30 Fed. Rep. 57, BROWN, J. Points of practice, procedure and evidence; prisoner discharged.

In re Miller, U. S. Cir. Ct. Penna. 1885, 23 Fed. Rep. 32, ACHESON, J. Right to hold escaped burglar extradited under other charge. Right sustained. (Prior to *U. S.* vs. *Rauscher*, 119 U. S. 407.)

Muller's Case, U. S. Dist. Ct. Penna. 1833, Fed. Cas. 9913, CADWALLADER, J. *Held*, that a petitioner, who had been arrested once before and discharged, could be arrested on new proceedings, it appearing that the evidence had not been fully considered at the former hearing.

In re Newman, U. S. Cir. Ct. N. D. Cal. 1897, 79 Fed. Rep. 622, MORROW, J. In this case a prisoner, held for extradition under the treaties of 1842 and 1890 with Great Britain, was brought up on *habeas corpus*. The objections taken were that the testimony was insufficient.

The principal question involved in this case was the right to arrest a British subject upon a British vessel. The commissioner held that he had jurisdiction. The Circuit Court held that this finding of the commissioner was not necessarily conclusive upon the Circuit Court but that as a matter of fact the jurisdiction existed.

In regard to the right to hold the prisoner, although arrested on a British ship, the court says (pp. 626–627):

"In considering the question of jurisdiction of the commissioner in this case, I find, upon the testimony that has been introduced before me, that the accused, when arrested, although upon a British vessel, was, nevertheless, within the territory of the United States. I find further, as a fact, on the testimony that has been presented, that he was seeking an asylum within the United States. These facts bring the petitioner within the provisions of the treaty of 1842 and section 5270 of the Revised Statutes.

"The claim, as the Swanhilda was a British vessel, her decks were British territory, cannot avail the petitioner in these proceedings. The vessel was within the territorial limits of the United States for all purposes relating to the execution of the treaties and the laws of the United States. It must be remembered that the application for extradition is made on behalf of

[7] For note 7 see 267.

§ 437. Rights of persons extradited to the United States. —In this section only those cases will be cited which have arisen and been decided in the United States *after* the prisoner

the British government, and it certainly would be an extraordinary intrepretation of the law that would determine that, under the treaties and laws relating to extradition, a warrant for the arrest of a British subject could not be made upon a British vessel within our territory. In the case of *In re Ezeta*, 62 Fed. Rep. 965, it was held that the prisoner could not set up the mode of his capture by way of defense, following the decision of the supreme court in the case of *Mahon* vs. *Justice*, 127 U. S. 700, 8 Sup. Ct. 1204. In that case the accused had been brought into port of the United States by a government vessel, and although they had applied to be allowed to leave the vessel at a foreign port, and before coming into the port of San Francisco, it was held that this fact did not affect the question of the jurisdiction of this court over the accused, after they were found within the territory of the United States; and, in passing upon the plea of jurisdiction, I declined to enter upon any inquiry as to the conduct of the navy department in bringing the fugitives to San Francisco, holding that the fact that they were found by the marshal of this district was sufficient for the purpose of the examination. The law determined in that case is applicable to the present case. The petition is therefore dismissed, and the petitioner remanded to the custody of the marshal."

In re Orpen, U. S. Cir. Ct. Cal. 1898, 86 Fed. Rep. 760, MORROW, J. Rules and procedure points and questions of evidence settled, including the manner in which the declaration of a dying woman could be admitted. Prisoner held.

In re Palmer, U. S. D. C., Penna. 1873, Fed. Cas. 10,679, CADWALADER, J. Definition of murder and questions of evidence. The prisoner was remanded, but the Secretary of State refused to issue the mandate.

In re Pederson, U. S. Dist. Ct. S. D. N. Y. 1851, Fed. Cas. 10,899*a*, BETTS, J. Extradition of deserter refused on special grounds.

People ex rel. Young vs. *Stout*, N. Y. Sup. Ct. 1894, 81 Hun 336, BRADLEY, J. A prisoner indicted for two different degrees of assault, one of which was extraditable, and the other not, having been extradited and tried and found guilty in the latter degree, cannot be held.

In re Reinitz, U. S. Cir. Ct. S. D. N. Y. 1889, 39 Fed. Rep. 204, BROWN, J. A person extradited, tried and acquitted and rearrested immediately on another offense. *Held* that he could not be arrested for another offense except that for which he was extradited until after a reasonable time had been given him after the acquittal to enable him to return to the country from which he was brought. Right of asylum, numerous cases cited.

In re Risch, U. S. Dist. Ct. Texas, 1888, 36 Fed. Rep. 546, SABIN, J. Prisoner remanded on the evidence, which was held sufficient. Questions of presumption of innocence involved.

has been brought to this country. In the cases cited in the previous section the prisoners objected to the method of their

Ex parte Ross, U. S. Dist. Ct. Ohio, 1869, 2 Bond, 252, Fed. Cases, 12,069, LEAVITT, J. Questions of practice and evidence discussed and prisoner remanded.

In re Roth, U. S. Dist. Ct. S. D. N. Y. 1883, 15 Fed. Rep. 506, BROWN, J. Definition of extraditable crime under French treaty, sufficiency of documentary evidence in compliance with statute, and prisoner remanded.

In re Rowe, U. S. Cir. Ct. 8th Cir. 1896, 77 Fed. Rep. 161, CALDWELL, J. Definition of embezzlement, sufficiency of evidence and questions of accessory and principal discussed, and prisoner remanded.

Sternaman vs. *Peck*, U. S. Cir. Ct. App. 2d Cir. 1897, 80 Fed. Rep. 883, WALLACE, J. (affirming *Ex parte Sternaman*, U. S. Dist. Ct. N. D. N. Y. 1896, 77 Fed. Rep. 595, COX, J.). (See also 83 Fed. Rep. 690, denying motion for re-argument in Cir. Ct. App.) Questions of evidence and procedure and right to review on *habeas corpus* discussed, and prisoner remanded.

In re Thomas, U. S. Dist. Ct. S. D. N. Y. 1874, 12 Blatchf. 370, Fed. Cases, 13,887, BLATCHFORD, J. Questions of procedure and practice discussed, and prisoner remanded.

Ex parte Van Earnam, U. S. Cir. Ct. S. D. N. Y. 1854, 3 Blatchf. 160, Fed. Cases, 16,824, BETTS, J. Practice, procedure, review of Commissioner discussed, and prisoner remanded.

Ex parte Van Hoven, U. S. Cir. Ct. Minn. 1876, 4 Dillon, 412, Fed. Cases, 16,658, NELSON, J. 4 Dillon, 415, DILLON, J. Prisoner having been discharged and re-arrested motion to discharge denied; points of practice reviewed. First arrest held to be insufficient, but second arrest sustained.

In re Veremaitre, U. S. Dist. Ct. S. D. N. Y. 1850, Fed. Cases, 16,915, JUDSON, J. Definition of crime under French extradition treaty, and points of practice discussed, and prisoner held.

In re Wadge, U. S. Dist. Ct. S. D. N. Y. 1883, 15 Fed. Rep. 864, BROWN, J. Definition of forgery, practice, and sufficiency of evidence discussed; prisoner remanded.

In re Wahl, U. S. Cir. Ct. S. D. N. Y. 1878, 15 Blatchf. 334, Fed. Cases, 17,041, BLATCHFORD, J. Prisoner remanded on ground that court would not review "judgment of commissioners."

United States vs. *Warr*, U. S. Dist. Ct. S. D. N. Y. 1845, Fed. Cases, 16,644, MORTON, Commissioner. Prisoner held, questions of evidence and affidavits discussed.

In re Wiegand, U. S. Dist. Ct. S. D. N. Y. 1877, 14 Blatchf. 370, Fed. Cases, 17,618, BLATCHFORD, J. Questions of evidence and practice reviewed, and prisoner remanded.

[6] *In re Mineau*, U. S. Cir. Ct. Vt. 1891, 45 Fed. Rep. 188, WHEELER, J. Conflict between State and Federal jurisdiction as to the custody of prisoner arrested in extradition proceedings. Federal authority maintained.

[7] *Ornelaz* vs. *Ruiz*, U. S. Sup. Ct. 1896, 161 U. S. 502, FULLER, Ch. J. *Held*, that the discharge of prisoners by a Commissioner on the ground that the offence charged was political was a matter within the power of the Commissioner which could not be reviewed on *habeas corpus*.

For additional cases see p. 404, *post*.

deportation from this country. They were able to do this because the courts had jurisdiction to protect their personal rights. When fugitives from this country are surrendered to the authorities abroad they have the same right to test the validity of the surrender before the courts of the country surrendering them.[1] After they have reached this country they have no right to demand their discharge because the proceedings were illegal in the other country.[2] If, however, they are brought here under treaty stipulations they can only be tried for the offence for which they have been surrendered.[3] The history of the controversy over this question between this country and Great Britain and referred

Prisoners were discharged and the appeal of the Mexican Consul therefrom dismissed.

In re Ezeta, U. S. Dist. Ct. Cal. 1894, 62 Fed. Rep. 964 and 972 (2 cases), MORROW, J. The right of a government to demand the extradition of political prisoners or of persons offending against military law discussed at length in this case which was somewhat complicated by the fact that the prisoners had taken refuge on a naval vessel of the United States and were thus brought to this country.

§ 437.

[1] See English statute cited in note 1 to § 436, p. 261, *ante*.

[2] *Ex parte Foss*, Sup. Ct. Cal. 1894, 102 Cal. 347, DE HAVEN, J.

Petitioner under indictment for embezzlement, a crime not included in the Hawaiian Treaty, fled to Honolulu and on request of the United States Minister was surrendered and brought back to California. On *habeas* he contended he could only be held for an extraditable offence, and that his extradition was improper, the crime not being included in the treaty list. *Held* that under those circumstances it was presumed that the Hawaiian Government surrendered him from comity and not under treaty. The prisoner was remanded. The right of the government to surrender without a treaty was discussed and sustained.

See also *Ker* vs. *Illinois*, cited in note 9 to this section.

[3] *United States* vs. *Rauscher*, U. S. Sup. Ct. 1886, 119 U. S. 407, MILLER, J. As this is probably the most important extradition case decided by the Supreme Court, extended reference will be made to it at this point.

The opinion is lengthy, reviewing many conflicting decisions of Federal and State courts; the points decided are stated in the syllabus as follows:

"Apart from the provisions of treaties on the subject, there exists no well defined obligation on one independent nation to deliver to another fugitives from justice; and though such delivery has often been made, it was upon the principle of comity. The right to demand it

to in the notes[4] is too long to be told in a brief review of the power of extradition, and the principle is now so well

has not been recognized as among the duties of one government to another which rest upon established principles of international law.

"In any question of this kind which can arise between this country and a foreign nation, the extradition must be negotiated through the Federal government, and not by that of a State, though the demand may be for a crime committed against the law of that State.

"With most of the civilized nations of the world with which the United States have much intercourse, this matter is regulated by treaties, and the question now decided arises under the treaty of 1842 between Great Britain and the United States, commonly called the Ashburton Treaty.

"The defendant in this case being charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the government of that country, and surrendered on this charge. The Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but for a minor offence not included in the treaty of extradition; and the judges of that court certified to this court for its judgment the question whether this could be done. *Held:*

"(1) That a treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.

"(2) That, on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of Congress on that subject, Rev. Stat. secs. 5272, 5275, he cannot lawfully be tried for any other offence than murder.

"(3) The treaty, the acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offense, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offence specified in the demand for his surrender. The national honor also requires that good faith shall be kept with the country which surrendered him.

"(4) The circumstance that the party was convicted of inflicting cruel and unusual punishment on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, does not change the principle."

As to the right of extradition except under treaties the opinion says (pp. 411, 412):

"Not only has the general subject of the extradition of persons charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the ex-

[4] For note 4 see p. 272.

settled that the subject is now one of historical rather than legal interest. The lower courts decided the point differ-

ecutive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country and in Great Britain.

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

"Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of Congress upon the subject, a *State* can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result."

Numerous cases are then reviewed including *In re Washburn*, 4 Johns. Ch. 106; *Short* vs. *Deacon*, 10 Sarg. & R. 125; *Holmes* vs. *Jennison*, 14 Peters, 540; *Ex parte Holmes*, 12 Vermont, 631; *People* vs. *Curtis*, 50 N. Y. 321.

"The question has not since arisen so as to be decided by this court, but there can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the Federal government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives.

"At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of congress on the

ently on different occasions as appears by the decisions cited in the notes,[5] but when the point reached the Supreme Court

subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

"Fortunately, this question, with others which might arise in the absence of treaties or acts of congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive."

Then follows a review of the text-books on the subject of extradition and the exact definition of what treaties are when made under the authority of the United States, citing numerous cases on pp. 418 and 419. After referring to the various statutes in regard to extradition, including sections 5272, 5275, Rev. Stat. U. S., the court says:

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offence than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offence than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."

The opinion then reviews several decisions as follows: *United States* vs. *Caldwell*, 8 Blatchf. 131; *United States* vs. *Lawrence*, 13 Blatchf. 295; *Adriance* vs. *Lagrave*, 59 N. Y. 110; *United States* vs. *Watts*, 8 Sawyer, 370; *Ex parte Hibbes*, 26 Fed. Rep. 421; *Commonwealth* vs. *Hawes*, 13 Bush. 697; *Blandford* vs. *State*, 10 Texas Ct. Appeal, Criminal Cases, 627; *State* vs. *Vanderpool*, 39 Ohio 273.

After commenting upon the fact that these cases were conflicting, the opinion says (pp. 429–430):

"Upon a review of these decisions of the Federal and State courts, to which may be added the opinions of the distinguished writers which

[5] For note 5 see p. 273.

for its decision the broad principle was decided and the matter can now be considered as settled.

we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release on trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

[4] Owing to the refusal of the United States to recognize as an obligation of international law the right of a fugitive surrendered under an extradition treaty to be tried only for the offense for which his extradition was asked, the English government refused to surrender fugitives under the treaty of 1842 unless the government would stipulate that they should be tried only for such offense.

This the United States government refused to do. In 1876 the government of the United States demanded the surrender of one Winslow charged with forgery. This was refused, the foreign secretary calling attention to the British extradition act of 1870, which provides that a fugitive shall not be surrendered by the government of Great Britain unless provision is made either by the law of the state receiving the fugitive or by the arrangement that the person surrendered shall not be tried in the foreign state for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded, until he shall have been restored or had an opportunity of returning to Her Majesty's dominions. (For a full abstract of this law, see Moore on Extradition, vol. 1, pp. 741, *et seq.*)

As no such assurance was given the surrender was refused.

The action of the British government was largely based on the decision in *United States* vs. *Lawrence*, U. S. Cir. Ct. S. D. N. Y. 1876, 13 Blatchford, 295, Fed. Cas. 15,573, BENEDICT, J., in which it was held that a fugitive extradited from Great Britain for one offense could be tried for another; at the time the law in the United States on this point was unsettled as no case had reached the Supreme Court and the lower Federal courts and higher State courts had rendered conflicting decisions, (these are all reviewed in the *Rauscher* case).

It was not until after the decision of the Supreme Court in *United States* vs. *Rauscher*, United States Supreme Court, 1886, 119 U. S. 407, MILLER, J., and referred to in note 3 to this section, p. 268, *ante*, that it was finally settled that a person extradited could only be tried here for the offence for which he was extradited.

After the decision in the *Rauscher* case applications were made for the surrender of fugitives by the United States, and the courts of Great Britain held that the decision in that case was declaratory of the law as it was understood in the United States and would be administered

Since the *Rauscher* decision there have been a number of

by the courts; that the British statute, above referred to, was complied with so far as the United States was concerned, and the custom of surrendering fugitives was thereupon resumed between this country and Great Britain. In 1889 a new treaty was concluded between the United States and Great Britain in which provision was made that surrendered fugitives should be tried only for the offence for which they were extradited; the United States Government has thus recognized the decision in the *Rauscher* case as a declaration of law binding upon all the departments of the Government. (U. S. Treaties in Force, edition 1899, pp. 259, *et seq*). As stated by Mr. Moore (vol. I, p. 196): "The only extradition treaty now in force (1888) negotiated since the treaty with Italy of March 25, 1868, which contains no provision in respect of trial for offences other than that for which surrender was granted was that of the Orange Free State of December 22, 1871."

A full account of the correspondence between the United States and Great Britain on this subject will be found in Moore on Extradition, vol. I, chap. 6, pp. 194–280, in which all the cases bearing on this subject are referred to and discussed, including a number of decisions rendered since the *Rauscher* case was decided, most of which are referred to the following notes to this section.

[5] The right to try for offences other than those in which the proceedings were based was sustained in

United States vs. *Caldwell*, U. S. D. C. S. D. N. Y. 1871, 8 Blatch. 131, BENEDICT, J. The doctrine of this case has been completely overruled by the decision in *United States* vs. *Rauscher*.

United States vs. *Lawrence*, U. S. Cir. Ct. S. D. N. Y. 1876, 13 Blatch. 295, Federal Cases 15,573.

Adriance vs. *Lagrave*, N. Y. Ct. App. 1874, 59 N. Y. 110, CHURCH, Ch. J., N. Y. Sup. Ct. Gen. Term, 1874, 1 Hun 689, DANIELS, J. These are among the leading cases on the right to hold prisoners extradited for causes other than those specified in the extradition papers.

Bacharach vs. *Lagrave*, N. Y. Sup. Ct. Gen. Term, 1874, 1 Hun, 689, DANIELS, J. This case is also reported under the title of *Adriance* vs. *Lagrare*. See that case.

The following are some of the cases in which it was held that extradited criminals could not be tried for offences not named in the treaty or for offences not named in the warrant of extradition until after he had been discharged and permitted to leave the State and voluntarily returned.

Commonwealth vs. *Hawes*, Ct. App. Ky. 1878, 13 Bush. 697, LINDSAY, Ch. J.

Blandford vs. *State*, Ct. App. Texas, 1881, 10 Tex. Ct. App. Crim. Cas. 627, HURT, J.

United States vs. *Watts*, U. S. Dist. Ct. Cal. 1882, 8 Sawyer, 370, HOFFMAN, J. The opinion contains a lengthy review of the relations between this country and Great Britain, and is one of the cases referred to in *United States* vs. *Rauscher*.

Ex parte Coy, U. S. Dist. Ct. Texas, 1887, 32 Fed. Rep. 911, TURNER, J. Extradition case prior to the *Rauscher* case in which it was held that an extradited person

other decisions involving the same point which are cited in the notes.[6]

could not be tried on any other offence than that for which he was extradited and that until the state court actually attempted to try him the United States courts would not interfere, but would rely upon the state court carrying out the law as it should be.

State vs. *Vanderpoel*, Sup. Ct. of Ohio, 1883, 39 Ohio Rep. 273, JOHNSON, Ch. J. This is one of the cases referred to in the *Rauscher* case, and which took the ground that a prisoner extradited could not be held and prosecuted for another crime, and that the provisions of the treaty with Great Britain are part of the law of the land, enforcible by the judicial tribunals of the States in behalf of prisoners detained and prosecuted.

All of these cases are cited and reviewed in the opinion in the *Rauscher* case just cited.

In re Cannon, Sup. Ct. Mich. 1882, 47 Mich. 481, CAMPBELL, J. This is an interstate rendition case but the court discussed the general laws relating to extradition and discharged the petitioner who had been extradited for one offence, released on bail and arrested in another.

[6] *Cosgrove* vs. *Winney*, U. S. Supreme Ct. 1899, 174 U. S. 64, FULLER, Ch., J.

Cosgrove was extradited from Canada to Michigan and gave bail; before trial he was arrested for another non-extraditable offence. Meanwhile, while under bail, he had returned to Canada and then returned to Michigan voluntarily. On writ of *habeas* the Court held that under the statute and the treaties with Great Britian he was entitled to have the offence for which he was extradited disposed of and then to depart in peace, and that his arrest on another charge meanwhile was "in abuse of the high process under which he was originally brought into the United States and cannot be sustained." On pages 67-68, the Court says:

"Cosgrove was extradited under the treaty, and entitled to all the immunities accorded to a person so situated; and it is admitted that the offence for which he was indicted in the District Court was committed prior to his extradition, and was not extraditable. But it is insisted that although he could not be extradited for one offence and tried for another, without being afforded the opportunity to return to Canada, yet as, after he had given bail, he did so return, his subsequent presence in the United States was voluntary and not enforced, and therefore he had lost the protection of the treaty and rendered himself subject to arrest on the capias and to trial in the District Court for an offence other than that on which he was surrendered; and this although the prosecution in the State court was still pending and undetermined, and Cosgrove had not been released or discharged therefrom.

"Conceding that if Cosgrove had remained in the State of Michigan and within reach of his bail, he would have been exempt, the argument is that, as he did not continuously so remain, and, during his absence in Canada, his sureties could not have followed him there and compelled his return, if his appearance happened to be re-

It has also been decided that the Federal courts have jurisdiction to prevent a State court from proceeding with the trial of an extradited prisoner for an offence for which he was not extradited.[7]

quired according to the exigency of the bond, which the facts stated show that it was not, it follows that when he actually did come back to Michigan he had lost his exemption.

"But we cannot concur in this view. The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offence for which he had been extradited, and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the state prosecution in any way. *United States* v. *Rauscher*, 119 U. S. 407, 433.

"The mere fact that he went to Canada did not in itself put an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he re-entered Michigan he was as much subject to the compulsion of his sureties as if he had not been absent."

In re Baruch, U. S. Cir. Ct. S. D. N. Y. 1890, 41 Fed. Rep. 472, BROWN, J. *Held* that a prisoner discharged on *habeas corpus* from arrest under extradition proceedings under treaty with Austria, and who has been brought into the State of New York on the petition of the Austro-Hungarian Consul, cannot be arrested in a civil suit in a New York State court for embezzlement of the same funds involved in the extradition proceeding; on *habeas* and *certiorari* the District Court of the United States released him and allowed him a reasonable time to return to New Jersey, the State whence he was brought by the United States marshal. *In re Reinitz*, 39 Fed. Rep. 204, distinguished; *United States* vs. *Rauscher*, 109 U. S. 407, followed.

Hall vs. *Patterson*, U. S. Cir. Ct. N. J. 1891, 45 Fed. Rep. 352, GREEN, J. Following *U. S.* vs. *Rauscher*, *held* that an extradited offendant can only be charged in the proceeding in which he was extradited.

People ex rel. Young vs. *Stout*, N. Y. Sup. Ct. 1894, 81 Hun, 336, BRADLEY, J. A prisoner indicted for two different degrees of assault, one of which was extraditable and the other not, having been extradited and tried and found guilty of the second degree, cannot be held.

In re Reinitz, U. S. Cir. Ct. S. D. N. Y. 1889, 39 Fed. Rep. 204, BROWN, J. A person extradited, tried and acquitted and rearrested immediately on another offense. *Held* that he could not be arrested for another offense except that for which he was extradited until after a reasonable time had been given him after the acquittal to enable him to return to the country from which he was brought. Right of asylum, numerous cases cited.

[7] *In re Mineau*, U. S. C. C. Vt. 1891, 45 Fed. Rep. 188, WHEELER, J. Proceedings against man in jail for other offense.

On the other hand, the Supreme Court has held that when a person, charged with crime, has been brought within the jurisdiction of a State from a foreign country in treaty relations with the United States by means other than the surrender by the government of that country on requisition of the United States, made pursuant to treaty stipulations, the United States will not interfere with the trial in the State courts,[8] notwithstanding such proceedings would be irregular

[8] *Ker* vs. *State Illinois*, U. S. Sup. Ct. 1886, 119 U. S. 436, MILLER, J. The plaintiff in this case is the same as the petitioner in *habeas* proceedings in the Circuit Court of the United States for the Northern District of Illinois, *In re Kerr*, 18 Federal Reporter, 167.

After his discharge had been refused by the Judge of the Circuit Court he was tried and convicted and sued out a writ of error from the Supreme Court basing the writ upon the effect of the question involved in the right of a State court to try a prisoner brought from Peru but not in accordance with the extradition treaty.

On the criminal trial the prisoner had set up that he had been improperly extradited as a plea in abatement which, on a demurrer had been overruled.

The plaintiff in error contended that the removal from Peru was practically unlawful and unauthorized and therefore in direct violation of the extradition treaty.

The court held that it was not an effective question to determine that point, as the State court had exclusive jurisdiction in regard thereto, because if not extradited under the treaty, jurisdiction was not conferred upon the United States Courts.

In this respect the court says (pages 441–444):

"This view of the subject is presented in various forms and repeated in various shapes, in the argument of counsel. The fact that this question was raised in the Supreme Court of Illinois may be said to confer jurisdiction on this court, because, in making this claim, the defendant asserted a right under a treaty of the United States, and, whether the assertion was well founded or not, this court has jurisdiction to decide it; and we proceed to inquire into it.

"There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

"Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States have surrendered

if the fugitive had been surrendered on a requisition. In the case referred to in the notes to this section the Federal courts held that they had no jurisdiction because the prisoner had not been brought from Peru under extradition proceedings.

Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

"In the case before us, the plea shows, that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.

"In the case of *United States* vs. *Rauscher*, just cited, *ante*, [119 U. S.] 407, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870–74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extra-

Extradition papers had indeed been prepared but the prisoner was seized and, as he claimed kidnapped, by the detectives who brought him to Illinois, without any presenta-

dition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

"We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right.

"The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the state court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: *Ex parte Scott*, 9 B. & C. 446 (1829); *Lopez & Sattler's Case*, 1 Dearsly & Bell's Crown Cases, 525; *State* vs. *Smith*, 1 Bailey So. Car. Law, 283 (1829); s. c. 19 Am. Dec. 679; *State* vs. *Brewster*, 7 Vt. 118 (1835); *Dow's Case*, 18 Penn. St. 37 (1851); *State* vs. *Ross and Mann*, 21 Iowa, 467 (1866); *Ship Richmond* vs. *United States* (*The Richmond*), 9 Cranch 102.

"However this may be, the decision of that question is as much within the province of the state court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

"It must be remembered that this view of the subject does not leave the prisoner or the Government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea without doubt sustained the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider."

tion of the papers or action by the Peruvian government. The same rule applies to fugitives voluntarily returning,[9] and, even though an agreement be entered into, the Federal Courts cannot interfere.

§ 438. **General summary of views in regard to extradition as depending on treaty.**—The power of the United States to extradite is either based upon the treaty-making power, or exists as one of the general attributes of nationality and sovereignty. If the former premise is true, it may be impossible for the United States to deliver any fugitive except in pursuance of treaty provisions with foreign powers. If, however, the right to extradite is an attribute of sovereignty, the United States must possess the same power to extradite aliens as it does to exclude or to deport them; in such event the power of the United States to extradite fugitives must be governed by the rules of international law and the general rights of the Government to exercise those attributes of sovereignty which we have discussed in preceding chapters. A

[9] *In re Cross*, U. S. D. C. E. D. Nor. Car. 1890, 43 Fed. Rep. 517, SEYMOUR, J. Prisoners tried and convicted for forgery committed in North Carolina asked for a writ of *habeas corpus* on the ground that after escaping to Canada they voluntarily came back with the United States marshal, under agreement to be tried for an offence specified in an agreement and submitted to such trial. They now contended that the offence for which they were tried was not the common-law offence of forgery as understood by the treaty of 1842 with Great Britain, and that they should not have been tried therefor. The writ was denied on the ground that such position should have been taken on the trial and could not be subsequently raised, and also on the ground that as they came back voluntarily "no question arises."

"No question arises under the constitution, treaties, or laws of the United States, and therefore the federal courts have no jurisdiction. The defendants were not extradited, and therefore could not have been tried in violation of the treaty of 1842. The case of *Ker* vs. *Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, was a stronger one than this, for Ker, who had taken refuge in Peru, had, pending extradition proceedings, been kidnapped in that country, and carried to Illinois for trial. Nevertheless the supreme court held that no case arose under the treaties, laws, or constitution of the United States. Conceding, contrary to the fact, that the state authorities violated the contract between their agent and defendants, there would at most arise either a defence to be interposed by a plea of abatement to the prosecution in Wake county or an action for damages, neither of which matters are relevant to this proceeding."

different rule might exist as to the power of the United States to extradite a citizen of a State, or of the United States, in the absence of treaty stipulations. There does not appear to be any power of exclusion or of deportation of citizens, as there is of aliens, and therefore different rules would be applicable to the cases of citizens and aliens.[1]

It is impossible in a brief review of this nature to discuss these questions at great length. The views of some of the leading authorities on the extent of the power of extradition, and on the power of sovereign governments to extradite, either through their legislative or executive departments, as their own voluntary act and not depending in any way upon treaty stipulations, have already been quoted in the notes to the precedings sections.[2] Some interesting historical facts referred to in Wharton's Digest, and other compilations of diplomatic records, show that the Government of the United States in determining its attitude on this matter must view it not only as a matter of right, but also as a matter of policy.[3]

§ 439. **Treaties of cession and extent of power exercised.**—As has been stated in a previous chapter devoted exclusively to this subject, treaties involving acquisition of territory have been entered into by the United States on numerous occasions; Great Britain, Spain, France, Mexico, Russia and the Government of the Samoan Islands have all ceded territory to the United States by treaty; Texas and Hawaii were not annexed by treaty, but by reciprocal legislation. Many of these treaties have contained provisions in regard to the protection to be afforded, and the status to be granted, to the inhabitants; the Treaty of Paris with Spain of 1898 provided in regard to the cession of Porto Rico, Guam and the Philippines that "the civil and political status of the inhabitants of the ceded territory shall be determined by the Congress of the United States;" questions are now

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[1] For authorities on questions affecting the surrender of its own citizens by governments both under general rules of comity and under special treaty stipulations, see Moore on Extradition, chap. V, vol. I, pp. 152, *et seq.*, and see also the stipulations as to extradition of citizens in treaties recently made by the United States in this respect.

[2] See § 433, p. 250, *et seq.*, *ante*.

[3] Wharton's Digest of International Law, §§ 268–282, vol. II, pp. 744–832, 2d Ed.

pending before the Supreme Court as to how far that treaty stipulation has clothed Congress with power to determine and establish the status of those inhabitants, and to what extent Congress must keep within those constitutional provisions which would limit it in legislating in regard to matters within the territory of the States. Should the Supreme Court decide that Congress has a free hand in legislating in that respect, as the ardent advocates of extreme power have asserted, it will certainly be a wonderful exposition of the extent of the treaty-making power and the power to legislate in pursuance of treaty stipulations. It is not proposed to discusss this subject again in this chapter, except in passing to refer to it as one of the instances in which the treaty-making power has been exercised.[1]

§ 440. **Effect of special clauses in treaty of Paris on status of inhabitants.**—The clause at the end of the Ninth Article of the Treaty with Spain of 1898[1] was inserted therein for the sole purpose of giving to Congress the power to legislate in that manner. The recent and present administrations of the Government of the United States have taken the position that under such article Congress has plenary power to establish by legislation the status of the inhabitants of Porto Rico, the Philippines and other territory recently acquired, and that such power is derived from three sources: first, from the general delegation in the Constitution to make rules and regulations regarding territory of the United States; second, from the inherent right of acquisition and the subsequent government of territory acquired, which the Government of the United States possesses as an attribute of sovereignty; third, from the treaty-making power under which the special stipulations in the treaty can be made

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[1] The reader is referred to chapter XIII *ante* where questions involved in change of sovereignty are discussed at length and cases cited; to the INSULAR CASE APPENDIX at end of volume I; and to chapter II of volume I, on the acquisition of territory by the United States.

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[1] "The civil and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." For this treaty in full see INSULAR CASES APPENDIX, Volume I, p. 508.

the foundation of all necessary and consistent legislation based thereon.

§ 441. **Effect of special stipulations in treaties of cession.** —In regard to treaty stipulations concerning the treatment of inhabitants in ceded territory, Mr. Justice Story says in his commentaries: "If the treaty stipulates that they shall enjoy privileges, rights and immunities of the citizens of the United States the treaty as part of the law of the land becomes obligatory in these respects. Whether the same effects would result from the mere fact of their becoming inhabitants and citizens by the cession without any express stipulation may deserve inquiry if the question should ever occur."[1]

At a later point he says: "The power of Congress over the public territory is clearly and exclusively universal and their legislation is subject to no control, but is absolute and unlimited unless so far as it is limited by stipulations in the cession, or by the ordinance of 1787 under which any part of it has been settled."[2]

The Supreme Court has said that no power existed in the King of Spain to clothe Congress of the United States with power to legislate;[3] if, however, a treaty of cession cannot be made in which the status of the ceded territory and its inhabitants shall either be fixed, or provision made for the subsequent determination thereof by Congress, the power to acquire territory by the United States instead of inuring to its great benefit, might inure to its great disadvantage. Unquestionably instances may occur when we shall be obliged to accept territory for indemnity, or other purposes, which we may wish to hold in an entirely different manner from any other possession of the United States; unless the United States in accepting it cannot expressly stipulate the con-

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[1] Story's Com. on the Const. vol. II, § 1324, p. 203, 5th edition, 1891.

[2] *Idem*, vol. II, § 1328, p. 206.

[3] "It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it." *Pollard's Lessees* vs. *Hagan*, U. S. Sup. Ct. 1845, 3 How. 212, p. 225, McKINLEY, J.

ditions under which it is accepted, the inhabitants of such acquired territory might become our masters instead of our subjects.[4]

§ 442. **The exercise of the right of eminent domain under the treaty-making power.**—The third instance referred to is the right of eminent domain; the treaty-making power of the United States has frequently been exercised in the settlement of international disputes in such manner that claims of citizens of the United States against foreign governments have been wiped out and absolutely surrendered so that they can never be asserted by the citizens, either in the courts of this country, or in the courts of the debtor government;[1] and this without providing any remedy, or prospect of indemnity, except such as Congress may thereafter provide, at its own time and convenience.[2]

[4] See JUSTICE WHITE'S concurring opinion in *Downes* vs. *Bidwell*, (INSULAR CASE) U. S. Sup. Ct. 1901, 182 U. S. 244, p. 287, and see extracts therefrom in INSULAR CASES APPENDIX at end of volume I.

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[1] No effort will be made to enumerate all the occasions on which this power has been exercised and claims of citizens of the United States against foreign governments have been surrendered and barred. Such a list, and to discuss the conditions under which claims conventions and other treaties have been entered into and their effect on the claims of citizens of the United States would simply be an abridgment of Mr. John Bassett Moore's History of International Arbitration already referred to, to which the reader is referred for detailed information on this subject. The TREATIES APPENDIX at end of this volume contains a list of all the treaties of this nature.

The most recent occasion in which claims of citizens of the United States have been surrendered by the United States by treaty was in 1898 in the treaty of peace with Spain, article 2 of which is as follows:

"Art. II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones."

In Moore's History of Arbitration will be found the proceedings of Commissions appointed for determining these claims distributing awards and indemnities received by the United States.

[2] In some cases no provision has been made for distributing the amounts received by the United States, in other cases it has been delayed, and in other cases congressional relief has been very prompt. The indemnification of the citizens of the United States for the claims which were surrendered under the treaties of 1800, and 1803 with France (U. S. Treaties and Conventions, edition 1889, pp. 322 and 331), was delayed for

The Supreme Court of the United States held in the early and leading case of *Ware* vs. *Hylton*,[3] which has already been referred to as the authority on the supremacy of treaty stipu-

over eighty years, until at last the original sufferers were allowed to present their claims to the Court of Claims by Acts of Congress passed Jan. 20, 1885, (23 U. S. Stat. at L. p. 283), and subsequently thereto.

The following are the leading *French Spoliation* Cases:

Holbrook vs. *United States*, U. S. Ct. of Claims, 1884, 21 Ct. Claims 434, DAVIS, J.

Cushing vs. *United States*, U. S. Ct. of Claims, 1886, 22 Ct. Claims, 1, DAVIS, J.

Gray vs. *United States*, U. S. Ct. of Claims, 1886, 21 Ct. Claims, 340, DAVIS, J.

Hooper vs. *United States*, U. S. Ct. of Claims, 1887, 22 Ct. Claims, 408, DAVIS, J.

The Brig William, U. S. Ct. of Claims, 1888, 23 Ct. Claims, 201, SCOFIELD, J. Also reported under names of *Haskins, Adams, Blagge*, vs. *United States*.

The Ship Betsey, U. S. Ct. of Claims, 1888, 23 Ct. Claims, 277, NOTT, J.

The Ship Jane, U. S. Ct. of Claims, 1889, 24 Ct. Claims, 74, NOTT, J.

The Leghorn Seizures, U. S. Ct. of Claims, 1892, 27 Ct. Claims, 224, NOTT, J.

The Brig Venus, U S. Ct. of Claims, 1892, 27 Ct. Claims, 116, NOTT, J. Also reported under *Cole* vs. *United States*.

The Ship Tom, U. S. Ct. of Claims, 1893, 29 Ct. Claims. 68, NOTT, J.

The Ship Ganges, U. S. Ct. of Claims, 1896, 31 Ct. Claims, 175, DAVIS, J.

The Ship Star, U. S. Ct. of Claims, 1900, 35 Ct. Claims, 387, WELDON, J.

The Schooner Henry and Gustavus, U. S. Ct. of Claims, 1900, 35 Ct. Claims, 393, WELDON, J.

The Ship Juliana, U. S. Ct. of Claims, 1900, 35 Ct. Claims, 400, PEELLE, J.

The Ship Parkman, U. S. Ct. of Claims. 1900, 35 Ct. Claims, 406 WELDON, J.

The Ship Apollo, U. S. Ct. of Claims, 1900, 35 Ct. Claims, 411, PEELLE, J.

The Ship Concord, U. S. Ct. of Claims, 1900, 35 Ct. Claims, 432, NOTT, Ch. J.

U. S. vs. *Gilliat*, U. S. S. C. 1896, 164 U. S. 42, PECKHAM, J. In this case the Court states what in its opinion Congress intended to do by the act of 1894 in regard to French spoliation claims, and it was held that the decisions of the Court of Claims were to be final, and not subject to review by the Supreme Court.

For a list of French Spoliation awards reported to Congress by the Court of Claims, see 23 Ct. Claims, 524, 24 Id. 550, 25 Id. 531, 26 Id. 637. See also p. 404, *post*.

Congress has acted much more promptly in regard to the claims affected by the Spanish treaty of 1898, the Spanish treaty claims commission having already been appointed under the act of March 2, 1901, (31 U. S. Stat. at L. p. 877, and referred to in note 5 to § 308, vol. I, p. 442, *et seq.*).

[3] *Ware* vs. *Hylton*, U. S. Sup. Ct. 1796, 3 Dallas, 199, and see extract from the opinions in §§ 326, *et seq.*, pp. 7, *et seq.*, *ante*.

lations over State legislation, that the treaty-making power of the United States could control the claims of citizens and make whatever disposition of them was necessary for the peace and welfare of the country, and could also establish claims of the citizens of the other government against citizens of the United States.[4] When, however, it becomes necessary to extinguish the claims of citizens of the United States against foreign governments, the power exists to do so, but the citizen is protected by the Constitution. [5] The Supreme Court has decided that claims of this nature are private property and cannot be taken for public use without just compensation. It would be impossible to give a complete list of all the treaties between the United States and foreign powers in which claims of citizens have been surrendered. Most of them provided for some method of ascertaining the amounts of the claims surrendered, and all of that class will be found in Moore's History of Arbitration[6] together with the subsequent proceedings based thereon. A number of such treaties will also be found in the TREATIES APPENDIX at the end of this volume. The frequent exercise of this right is evidenced by the fact that up to 1896 the United States had participated in fifty-two arbitrations for the settlement of claims,[7] in nearly every case the claims of citizens of this country being involved. In the next two sections a brief reference will be made to some of the legal points involved in this exercise of power. This right to indemnity exists in its full force and effect as a *chose in action*, but the right to enforce it is suspended, not because there is no remedy, but because there is no court which has jurisdiction to determine and enforce the claim. This condition of affairs is the natural result of the rule that a sovereign power cannot be sued in its own courts without its consent, and, of course, the courts of other powers would have no jurisdiction either to hear or enforce such claims. In the cases cited in the notes to the next section we shall see that in all cases in

[4] Const. of U. S. art. V of Amendment. See Vol. I, p. 519.

[5] *Comegys* vs. *Vasse*, U. S. Sup. Ct. 1828, 1 Peters, 193, STORY, J. See extract from opinion and syllabus in note 1 to § 443, p. 286, *post.*

[6] History of Arbitration, etc., see note 1 this section on p. 283, *ante.*

[7] For this list consult Moore's History of Arbitration; Index thereto and Table of Contents, of vols. I and II.

which the regularly constituted courts of this country have had the opportunity to pass upon these claims they have been confined in their jurisdiction to the *disposition* of the award, and not to the merits of the controversy as between the claimant and foreign governments or this government as the case may be, except in those cases in which Congress has, by special enactment, created the court specially for the purpose, or has clothed one of the existing courts with jurisdiction for this purpose.

§ 443. **Claims against foreign governments as property rights; Justice Story's opinion in Comegys vs. Vasse.**— The Supreme Court of the United States has held that the just claims of American citizens against foreign governments are *choses in action*, *i. e.*, property rights which are subject to barter and sale, and which, in fact, under a general assignment pass to the assignee. Mr. Justice Story so decided in 1828,[1] in a case between an assignor and his assignee thus

§ 443.
NOTES ON STATUS OF INTERNATIONAL CLAIMS AGAINST FOREIGN GOVERNMENTS.

[1] Extracts from opinions in, and syllabuses, of the following cases are here given, as they describe the status of claims of citizens of the United States against foreign governments better than can be done in any condensation of the cases or expressions of opinion by the author.

Comegys vs. *Vasse*, U. S. Supreme Ct., 1828, 1 Peters, 193, STORY, J.

As this is one of the leading cases on the question of claims against another government and on the assignability of awards, it has been frequently cited and followed. The points decided as stated in the syllabus are as follows: (The numbers following the paragraphs indicate the pages of the opinion.)

"The object of the treaty [with Spain, of February 22, 1819] ceding Florida to the United States, was to invest the commissioners with full power and authority to receive, examine, and decide upon the *amount* and *validity* of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it

directly involving the question of whether such claims were or were not assignable property rights.

is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances it cannot be presumed, that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of others, who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties." (212.)

"In general, it may be affirmed, that mere personal *torts*, which die with the party, and do not survive to his personal representatives, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims, growing out of, and adhering to property, may pass by assignment." (213.)

"The law gives to the act of abandonment to underwriters when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction." (214.)

"The right to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own Courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the use of the ultimate sufferer." (215.)

"It is not universally, though it may ordinarily be one test of the right, that it may be enforced in a Court of Justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain, nor the government of the United States, is suable in the ordinary Courts of Justice, for debts due by either. Yet, who will doubt that such debts are rights? It does not follow because an unjust sentence is irreversible, that the party had lost all right to justice, or all claim, upon principles of public law, to remuneration." (216.)

This decision has been followed in similar cases involving the status of the "Alabama"[2] claims settled by the Geneva

[The treaty with Spain] "recognized an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity. It was demanded by our government as matter of right, and as such was granted, by Spain." (217.)

The court decided that the right to compensation from Spain, held under abandonment made to underwriters, and accepted by them, for damages and injuries which were to be satisfied under the treaty, by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800.

STATUS OF ALABAMA, ETC., CLAIMS.

[2] *Great Western-Insurance Co.* vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 193, MILLER, J. (affirming Ct. Claims, 1884, 19 Ct. Claims, 206, DRAKE, Ch. J.) The basis of this action appears in the synopsis of the case in the Court of Claims.

The Supreme Court held that under section 1066, Revised Statutes, providing that the jurisdiction of the Court of Claims shall not extend to any claim against the Government not pending on December 1, 1862, growing out of, or dependent on, any treaty stipulation entered into with foreign nations or Indian tribes, was comprehensive and explicit, and that, if the cause of action either grew out of treaty stipulations or was dependent thereon, it could not be considered in that court.

The position of the insurance company was that as soon as the United States entered into the treaty of Washington of 1871, and took charge of all of the Alabama claims, that the claim became one against the Government of the United States and not dependent upon the treaty, but the court *held* that nothing connected with the proceedings changed the fact that the final recognition and payment of the claim grew out of a stipulation of the treaty, and says, on p. 197:

"In any ordinary or usual sense of the words here used, appellant's claim, as set forth in the petition, grows out of the stipulations of the Treaty of Washington. The allegation is, that the United States took charge of the claim of petitioner against Great Britain for the injuries inflicted by the Alabama and the Florida. That, by a treaty on that subject, Great Britain stipulated that she would pay this claim to the United States, as petitioner alleges, for the use of said petitioner. In accordance with said stipulation, Great Britain did pay it to the United States, and the purpose of payment under the treaty inhering in the receipt of the money constitutes the foundation of appellant's claim. The intervention of the Board of Arbitration and its award as a means of ascertaining the liability of Great Britain, does not change the fact that the final recognition and payment of the claim *grows out of the stipulation of the treaty.*

"In a still clearer sense it is obvious that this recognition of the claim

Tribunal which was constituted under the Treaty of Washington (1871) with Great Britain and which awarded to the

by the award and its payment to the United States, were dependent on the treaty stipulation. Without the treaty the award would have bound nobody, and would have been at most a friendly recommendation. By virtue of the treaty it became a most solemn and important international obligation, whereby Great Britain became bound, as much as a nation can be bound, to pay the amount of the award, and, at the same time, became freed and discharged from any further liability on account of any claims of that class.

"The effort of counsel to ignore the treaty, the award and the receipt of the money by the United States as the foundation of appellant's claim, and rest the right to recover solely upon the act of March 31, 1877, by which the fund was changed from an investment in government bonds and paid into the government treasury, is too fanciful for serious consideration. If the government had not become liable, by reason of the original receipt of the money from Great Britain, under the treaty by which that country was discharged and released from the claim of plaintiff, it is difficult to comprehend how it became liable by a mere change in the manner of keeping the account. Whether the United States was liable on the bonds held in its own treasury vaults, or on account of the actual money represented by those bonds in the same vaults, cannot be material in estimating the nature and extent of that obligation.

"Nor can we assent to the proposition that the section cited was designed to prevent foreign governments or Indian tribes from suing the United States to enforce rights founded on treaties. No such suit has ever been brought, either before or since the enactment of this provision. It is not believed that without it any one ever supposed that the Court of Claims had jurisdiction of suits by Indian tribes or foreign nations against the United States. It could not have been passed, therefore, to prevent such a suit."

The Court distinguished the *Atocha* case, 17 Wallace, 439, as a special act of Congress authorizing the Court of Claims to consider that case; in the present instance there was a commission specially appointed and in existence, and therefore the Court of Claims had no jurisdiction.

United States vs. Weld, U. S. Sup. Ct., 1883, 127 U. S. 51, LAMAR, J. This case involved the rights under various acts of congress relating to the distribution of the fund remaining out of the Alabama award after the direct claims would be paid. The question was whether or not the Court of Claims had jurisdiction. The points decided as to jurisdiction are stated in the syllabus as follows:

"In order to make a claim against the United States one arising out of a treaty within the meaning of Rev. Stat. sec. 1066, excluding it from the jurisdiction of the Court of Claims, the right itself, which the petition makes to be the foundation of the claim, must derive its life and existence from some treaty stipulation.

"A claim against the United States made under the provisions of the

United States fifteen and a half million dollars for damages caused to American commerce by the depredation of

act of June 5, 1882, 22 Stat. 98, c. 195, 're-establishing the Court of Commissioners of Alabama Claims and for the distribution of unappropriated moneys of the Geneva Award,' is not a claim growing out of the treaty of Washington within the sense of the word 'treaty,' as used in Rev. Stat. sec. 1066.

"The payment of the expenses of the Geneva Arbitration has not been charged by Congress upon the fund received under the award made there."

In regard to the question of whether these claims grew out of a treaty or not the opinion, after referring to the case of *Alling* vs. *United States* 114 U. S. 562, MILLER J., which was based on a claim paid by Mexico pursuant to a treaty in which it was held that the court did not have jurisdiction, says (p. 56):

"The reason of the ruling by this court in that decision is plain. The claim there in controversy was expressly recognized as a specific claim by the commission organized under the provisions of the treaty with Mexico, and was, therefore, dependent upon the treaty, and grew directly out of it.

"In this case the reverse is true. The treaty of Washington did not recognize this claim as a specific claim. The award of $15,500,000 directed to be paid by Great Britain, was to the United States as a nation. The text of the treaty itself speaks of the 'claims on the part of the United States,' and in article 7 the gross sum was 'to be paid by Great Britain to the United States.' It is not necessary to discuss whether, in the absence of any action by Congress as to the distribution of this fund, there could have been any legal or equitable right in a person or corporation to any portion of it. The fact that the Congress of the United States undertook to dispose of this fund, and to administer upon it, in accordance with its own conceptions of justice and equality, precludes, at least for the purposes of this decision, judicial inquiry into such questions. The claimants had to rely upon the justice of the government, in some of its departments, for compensation in satisfaction of their respective claims; and this compensation, the various acts of Congress, heretofore mentioned, provided. The claimant in this case does not seek to recover upon any supposed obligation created by the treaty of Washington, but upon the specific appropriation made in the act of June 2, 1886. It is under this act that a means of satisfaction of this claim was provided. The claim may, therefore, be said to be 'founded upon a law of Congress,' within the meaning of sec. 1059, Rev. Stat., and therefore clearly one, of which the Court of Claims could take jurisdiction.

"It may be said, in opposition to this view of the case, that had there been no treaty of Washington, there would have been no fund of $15,500,000 to distribute, the act of June 5, 1882, would never have been passed, and therefore, that the treaty is the basis of all the subsequent legislation, and consequently the basis of this claim; in other

Confederate cruisers which had either been built or sheltered in British harbors.

words, that therefore, this claim is 'dependent upon and grows out of' the treaty of Washington.

"We are of opinion, however, that such a *dependency upon or growing out of*, is too remote to come within the meaning of sec. 1066, Rev. Stat. In our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims by sec. 1066, Rev. Stat. In order to make the claim one arising out of a treaty within the meaning of sec. 1066, Rev. Stat. the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation. This ruling is analogous to that of the ancient and universal rule relating to damages in common-law actions; namely, that a wrongdoer shall be held responsible only for the *proximate*, and not for the *remote*, consequences of his action.

"This disposition of this question renders it unnecessary to consider whether sec. 1066 has been repealed by the subsequent act of Congress, approved March 3, 1887, (*supra*,) since, if there has been such repeal, it is admitted, on all hands, that the Court of Claims would have jurisdiction of the case.

"On the merits of the case, we think there can be no doubt that the accounting officers of the Treasury Department were in error in charging to, and deducting from, the fund the expenses of the Tribunal of Arbitration at Geneva. The payment of those expenses had already been provided for by Congress by the act of December 21, 1871, 17 Stat. 24, and was never chargeable to this fund.

"In the language of the court below: Section five of the act of June 2, 1886, (*supra*), fixes the amount of the fund and specifies exactly what shall be deducted from it, and provides that the balance shall be distributed to the judgment creditors. The item thus deducted was not among those thus specified.

"We are of the opinion that the claimants are entitled to their share of the amount thus improperly deducted, and the decision of the Court of Claims is therefore affirmed."

Bachman vs. *Lawson*, U. S. Supreme Ct. 1884, 109 U. S. 659, GRAY, J. After the treaty of Washington of 1871 with Great Britain, Congress passed an act, June 23, 1874, directing that the court should allow, out of the amount awarded on any claim proved against the fund paid by Great Britain after the Alabama award, reasonable compensation to the counsellor and attorney for the claimant, and issue a warrant therefor, and that all other liens or assignments for services should be void.

The court held that an agreement made prior to the passage of the act was not affected by the act, and that the plaintiff was entitled to recover twenty-five per cent of an award made for damages by reason of the capture made by the Florida, pursuant to a written agreement.

During the course of the argument the question was raised whether

Some of the cases cited[3] involved the status of claims of British subjects against the United States decided by the Mixed Commission established under the same treaty.

or not the treaty of Washington had extinguished the claim against Great Britain and constituted the plaintiff's right of recovery solely a claim against the United States.

The court held, however, (p. 663) that: "The claim of the defendants was one for which compensation was justly due to them from Great Britain; was demanded by the United States from Great Britain as a matter of right; as such was awarded to be paid and was paid by Great Britain to the United States, in accordance with the provisions of the treaty between the two nations, and with the determination of the Tribunal of Arbitration created by that treaty; and was paid by the United States to the defendants, out of the money received from Great Britain, pursuant to the directions of the act of Congress, and to the decision of the Court of Commissioners established by that act. The defendants were the original owners of the claim, and the money was granted and paid by the United States to them as such. The money so demanded and received by the United States from Great Britain, and paid by the United States to the defendants, was money collected on the claim described in the agreement. *Comegys* vs. *Vasse*, 1 Pet. 193; *Phelps* vs. *McDonald*, 99 U. S. 298; *Leonard* vs. *Nye*, 125 Mass. 455."

Williams vs. *Heard*, U. S. Sup. Ct. 1891, 140 U. S. 529, LAMAR, J. This was a controversy over an award made by the Court of Commissioners of the Alabama claims in which the court followed *Comegys* vs. *Vasse*, 1 Pet. 193. Previous cases on this point are discussed and the point decided is stated in the syllabus as follows:

"When the judgment of a state court is against an assignee in bankruptcy in an action between him and the bankrupt, where the question at issue is whether the matter in controversy passed by the assignment, this court has jurisdiction in error to review the judgment.

"The sum awarded by the Tribunal of Arbitration at Geneva, when paid, constituted a national fund, in which no individual claimant had any rights, legal or equitable, and which Congress could distribute as it pleased.

"The decision and awards of the Court of Commissioners of Alabama Claims, under the statutes of the United States, were conclusive as to the amount to be paid upon each claim adjudged to be valid, but not as to the party entitled to receive it.

"A claim decided by that court to be a valid claim against the United States is property which passes to the assignee of a bankrupt under an assignment made prior to the decision.

"*Comegys* vs. *Vasse*, 1 Pet. 193, again affirmed and applied, and *United States* vs. *Weld*, 127 U. S. 51, distinguished."

[3] *Phelps* vs. *McDonald*, U. S. Sup. Ct. 1878, 99 U. S. 298, SWAYNE, J. McDonald was a British subject who had been adjudged a bankrupt in 1868. He had a claim against the United States which, under the treaty of Washington of 1871, was referred to what was known as the Mixed

Notwithstanding the fact that these claims are property rights, on numerous instances claims of citizens have been

Commission; an award was made in his favor. The plaintiff was his assignee in bankruptcy and claimed the award.

In the opinion all of the principal cases are discussed including *Comegys* vs. *Vasse*, 1 Peters, 193; *Erwin* vs. *United States*, 97 U. S. 392, *Clarke* vs. *Clarke*, 17 Howard, 315; *Milnor* vs. *Metz*, 16 Peters, 221; *United States* vs. *O'Keefe*, 11 Wallace, 178; *Carlisle* vs. *United States*, 16 Wallace, 147; and after reviewing Judge Story's opinion in the *Comegys* case the court says (pp. 303–304):

"It is needless for us in this case to go over the same field of discussion. A few remarks, however, grounded chiefly upon that authority will not be out of place. It will be observed that the claim against Spain, and the claim against the United States, here in question, rested upon the same foundation, and that each was surrounded by like circumstances.

"There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. It is but a short time since our government could be sued, and it can be done now only under the special circumstances defined by the statute. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. If the demand be just, and recognized as valid by the law of nations, the claimant, or his government; if the latter choose to do so, may still press it upon the attention of the alien government.

"If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrong-doer be a government or an individual, is clearly within this category. *Erwin* vs. *United States*, 97 United States, 392. The register's deed in this case bears date February 12, 1869. The title then became vested in the appellant. Thereupon he stood in the place of McDonald, and was clothed with all the rights which had belonged to the bankrupt before he became such. On the 25th of September, 1873, within less than five years after the assignment, an award was made by the mixed commission sitting under the treaty between the United States and Great Britain for the payment of $187,190 in satisfaction of the claim.

"In the light of these considerations, it would be sheer fatuity to

absolutely destroyed, so far as they existed against the foreign government, by the action of the Executive in making

deny the substantial character and value of the claim at the time of the transfer of the register's deed."

It was also held in this case that the sale of certain accounts, notes, judgments, etc., under an order of the district court did not divest the assignee of title.

It was also contended in this case that the suit was properly brought against the British government, and the United States court had no jurisdiction of the case. The court did not entertain that view of the case.

The question as to whether or not the commission had jurisdiction to decide to whom the fund belonged and that its award to McDonald was final, was also disposed of by holding that such commission decided, generally, only as to the validity of a claim and the amount to be paid.

In regard to these two points the court says (pp. 306–308):

"This objection assumes facts which have no existence. The British government is in nowise, either in form or substance, a party to the record, and no final or coercive judicial action is sought except with respect to McDonald and White. In the progress of the case below George W. Riggs was appointed receiver, with authority to collect the fund. Of course, he could do nothing without the voluntary concurrence of the just and eminent British agent, who was in possession. By consent of parties the fund was delivered to the receiver, and in the final decree brought here for review he was directed to pay it over to the appellees, less certain charges and expenses incurred in procuring the award, and he was thereupon to be discharged from his office. We have heard no objection from any quarter to the placing of the fund in the hands of the receiver. Certainly none has been suggested in behalf of the sovereignty whose rights are said to have been invaded.

"But suppose, as has been suggested, that the money were in the British exchequer, at the seat of the home government, still the court below acquired jurisdiction of the parties and of the cause, and had an important duty to perform.

"Such commissions as that which made the award here in question usually decide only as to the validity of the claim and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide upon the ownership of the claim. They have no means of compelling the attendance of parties or witnesses, no rules of pleading or procedure applicable to such a case, and the foreign element in the tribunal, at least cannot be supposed to have any knowledge of the law according to which the question is to be determined. The validity of the claim depends upon the law of nations; its ownership upon the local jurisprudence where the transfer is alleged to have been made.

"Hence, *Comegys* vs. *Vasse*, *Clark* vs. *Clark*, *supra*, and other like cases have arisen, involving conflicting claims to the fund awarded and nothing else.

a treaty, and of the Senate in ratifying it; in such cases no further action of Congress appears to be necessary so far as the complete extinguishment of the claim against the other government is concerned, but congressional action is necessary in order that the American citizens whose property has been confiscated may prove their claims against the United States and be indemnified for the loss they have sustained. The nature of these claims[4] and many other points

"In this case, whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right. This court has twice decided that a British subject can sue the United States in the Court of Claims, because an American citizen is permitted to sue the British government by a petition of right. The act of Congress creating the court requires reciprocity. *United States* vs. *O'Keefe*, 11 Wall. 178; *Carlisle* vs. *United States*, 16 id. 147.

"If the claim of the assignee were presented to the British government by a petition of right, and the claim of McDonald were also presented, the parties, in the absence of any judicial determination, would doubtless be required to settle their controversy by interpleading, or in some other appropriate form of litigation. If the appellant shall be finally successful in this case, and the record should be presented with his petition, no such question could arise, and judgment in his favor must necessarily follow. Conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense, and other inconveniences of a suit before a foreign tribunal? The adjudication would be as binding in one case as in the other.

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ* which he could do voluntarily, to give full effect to the decree against him.

"Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story Eq. sec. 899; *Miller* vs. *Sherry*, 2 Wall. 249; *Penn* vs. *Lord Baltimore*, 1 Ves. 444; *Mitchell* vs. *Bunch*, 2 Paige (N. Y.), 606."

GENERAL CASES.

[4] *Alling* v. *United States*, U. S. Sup. Ct. 1885, 114 U. S. 562, MILLER, J. Nature of claims against foreign governments discussed.

Bayard vs. *White*, U. S. Sup. Ct. 1888, 127 U. S. 246, BLATCHFORD, J. This was a petition for a mandamus to compel the Secretary of State

connected therewith have frequently been the subject of judicial construction and some of the decisions affecting them

to pay over to the petitioner parts of certain awards which had been paid to the Secretary of State by Mexico under the Claims Convention of 1868.

A dispute had arisen between White, the relator, and Porter. Litigation was in progress over the ownership of the assigned portions of the awards and the Secretary of State declined to pay either. In the Supreme Court of the District of Columbia a mandamus was issued. The Secretary of State appealed to the Supreme Court, which reversed the decision of the court below and dismissed the petition. The Secretary of State in his answer had stated that he could not pay over the money to White on account of the litigation between himself and Porter, without embroiling the United States in a litigation in which it had no interest.

The Supreme Court held that this was adequate ground for the refusal of the Secretary of State, and that, in view of such litigation and notice thereof, the Secretary of State was not bound to decide between the conflicting claims and take the risk of the courts deciding differently after he had paid out the money.

Borgmeyer vs. *Idler*, U. S. Sup. Ct. 1895, 159 U. S. 408, FULLER, Ch. J. This case involved the award made under the treaty with Venezuela and the right to obtain a portion thereof under agreements made in regard thereto. *Held*, that there was no jurisdiction and that the mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under a treaty with a foreign power, providing for the submission of claims against that power of arbitration, does not in any way draw in question the validity of the construction of that treaty.

Baldwin vs. *Ely*, U. S. Sup. Ct. 1850, 9 Howard, 580, TANEY, Ch. J. Nature of property rights in certificates issued under Claims Convention of 1839 and Acts of Congress carrying it into effect, defined.

Barthe vs. *Denis*, U. S. Sup. Ct. 1890, 133 U. S. 514, FIELD, J. Citizenship of claimant involved under the Civil War Claims Convention of 1880.

The Caldera cases, U. S. Ct. of Claims, 1879, 15 Court of Claims, 546, DRAKE, Ch. J. Distribution of indemnity paid by China under treaty of 1848.

Cherokee Nation vs. *So. Kansas Railway Co.*, U. S. Sup. Ct. 1890, 135 U. S. 641, HARLAN, J. Involves the power of the United States to exercise the right of eminent domain with respect to the lands in territories, when affected by Indian treaties.

Clark vs. *Clark*, U. S. Sup. Ct. 1854, 17 Howard, 315, CATRON, J. *Held*, that awards of commissioners under Claims Convention with Mexico of 1839 and the treaty of 1848 should be paid over for the benefit of creditors of the claimant, notwithstanding that he had been discharged in bankruptcy and all claims had been sold at auction for a nominal sum to his own nominee.

are cited in the notes. As it is impossible to analyse them all in a book of this nature they should all be carefully examined.

Delafield vs. *Colden*, N. Y. Ct. Chan. 1828, 1 Paige, 139, WALWORTH, Chancellor. *Held*, that after the dissolution of a copartnership the amount awarded by commissioners on a claim against the Spanish government, in which there had been a long delay of prosecution and collection, the representatives of a partner were entitled to collect their share on paying a proportion of the expenses and that the liquidating partner had prosecuted the claim as trustee for all concerned.

Dutilh vs. *Coursalt*, U. S. Cir. Ct. D. C. 1837, 5 Cranch, C. C. 349, GRANBY, J., Fed. Cas. 4206. Conflicting claims to awards settled.

Frevall vs. *Bache*, U. S. Sup. Ct. 1840, 14 Peters, 95, TANEY, Ch. J. *Held*, that the courts had jurisdiction to determine conflicting claims to award.

Emerson vs. *Hall*, U. S. Sup. Ct. 1839, 13 Peters, 409, MCLEAN, J. The difference between a claim against a foreign government, assumed by the United States or settled in a Claims Convention and subsequent commission, and a donation by the United States indemnifying a person who had suffered loss is distinguished in this case, the Supreme Court holding that the reimbursement was in the nature of an award and not of a claim, and, therefore, went to the heirs of the original person and not to his creditors.

French Spoliation cases, Ct. of Claims, 1884–1896. See note 1 under § 442, pp. 283, 284, *ante*.

Gill vs. *Oliver's Executors*, U. S. Sup. Ct. 1850, 11 How. 529, GRIER, J., *Williams* vs. *Gibbes*, U. S. Sup. Ct. 1857, 20 Howard, 535, NELSON, J., and *Mayer* vs. *White*, U. S. Sup. Ct. 1860, 24 Howard, 317, NELSON, J. These three cases all involved the status of the same claim against Mexico and rights of assignees and executors of original parties which were adjudicated after the award had been made and collected.

Heard vs. *Bradford*, Sup. Ct. Mass. 1808, 4 Mass. 326, SEDGWICK, J. Conflicting claims to award under treaty with Great Britain adjudicated.

Judson vs. *Corcoran*, U. S. Sup. Ct. 1854, 17 Howard, 612, CATRON, J. Assignability of international claims.

Law vs. *Thorndike*, Sup. Ct. Mass. 1838, 20 Pick. (Mass.) 317, SHAW, Ch. J.

Lee, Adm'x, vs. *Thorndike*, Sup. Ct. Mass. 1841, 43 Mass. 313, PUTMAN, J. The above cases involved conflicting claims to awards under the French treaty of 1831.

Leonard vs. *Nye*, Sup. Ct. Mass. 1878, 125 Mass. 455, GRAY, Ch. J. *Comegys* vs. *Vasse*, 1 Peters, 193, followed and *held* that claims under the Geneva Award were based upon the original claim against Great Britain and not upon the subsequent recognition of the claims by Great Britain, and that those claims became property and passed to the assignee.

Lewis vs. *Bell*, U. S. Sup. Ct. 1854, 17 Howard, 616, GRIER, J. *Held* that "where a claimant upon the government of Brazil assigned his claim to a creditor soon after the transaction occurred which gave rise to the claim, and the assignment appeared to have been made upon good

§ 444. Methods of enforcing claims of this nature; courts and commissions; National and individual claims distinguished.—Claims of citizens of the United States

consideration, the assignee was entitled to receive the proceeds of the award of the commissioners. The assignee took measures, immediately after the assignment, to protect his rights."

New York Ins. Co. vs. *Roulet*, Ct. of Errors, New York, 1840, 24 Wendell 505, BRADISH, Pres. etc., NELSON, C. J. Same case as *Varet* vs. *New York Ins. Co.*, New York, Chancery 1839, 7 Paige Ch., 560, WALWORTH, Chan. In affirming the judgment below the point decided is stated in the syllabus as follows:

"Where a cargo of merchandise, which was insured, was seized and condemned by the French government under the *Berlin* and *Milan decrees*, and a compromise was subsequently made between the underwriters and the assured, by which the latter accepted from the former $5,000 in satisfaction of their claim against the underwriters, which was for $15,000, and surrendered the policy, but did not assign or cede the right to claim indemnity from the French government, *it was held*, on the underwriters subsequently obtaining $5,000 under the convention between the American and French governments, providing indemnity for spoliation upon our commerce, that the *award* of the *commissioners* under the treaty, giving the money to the underwriters instead of the assured, was not *conclusive* as between the parties, and that the money thus obtained was held *in trust* for the assured, and the underwriters were decreed to pay over the same.

"*It was also held*, that though an *action at law* might have been sustained for the recovery of the money, a *bill in equity* was proper; the jurisdiction of the courts in a case like this being *concurrent*."

Ridyway vs. *Hays*, U. S. Cir. Ct. D. C. 1836, 5 Cranch C. C. 23, CRANCH, J. Controversy over award; distribution of award by French claim commission of 1831.

Stewart vs. *Callaghan*, U. S. Cir. Ct. Dist. Columbia, 1835, 4 Cranch C. C. 594. *Held*, that the commissions of a supercargo of a sequestered cargo are a charge upon the proceeds of sales, and are not included in the indemnity to be granted by the sequestering government.

The indemnity stands in the place of the proceeds of sale and the commissions are a charge upon that indemnity.

Shepard vs. *Taylor*, U. S. Sup. Ct. 1831, 5 Peters, 675, STORY, J. Conflicting claims to award of commission adjudicated.

Thomas vs. *United States* and *Roberts* vs. *Same*, U. S. Ct. Claims, 1 Devereux, 29 and 31, BLACKFORD, J. In these cases *held* that the rejection of claims submitted to the commission appointed under the treaty with Spain of 1819 and rejected, was final and that there was no appeal from such decision.

United States vs. *Diekelman*, U. S. Sup. Ct. 1875, 92 U. S. 520. WAITE, Ch. J. In this case a claim of the owner of the *Essex* detained during the civil war was rejected.

United States vs. *Ferreira*, U. S. Sup. Ct. 1851, 13 Howard 40, TANEY,

against foreign governments are not determined by municipal, but by international law. It may be stated as a general proposition of law that the courts of this country, Federal and State, have no jurisdiction thereover;[1] and, as has already

Ch. J. Status of claims arising against Spain under Florida treaty of 1819 and assumption by United States.

United States vs. *Gilliat*, U. S. Sup. Ct. 1896, 164 U. S. 42, PECKHAM, J. This is a brief opinion deciding what Congress intended to do by the act of 1894 in regard to French spoliation claims. The point decided is stated in the syllabus.

This came up at this time on a motion to dismiss the appeal which had been taken by the United States from a decree of the Court of Claims and the motion was granted.

The syllabus states as follows:

"It was the intention of Congress, by the language used in the act of August 23, 1894, c. 307, 28 Stat. 424, 487, to refer to the Court of Claims simply the ascertainment of the proper person to be paid the sum which it had already acknowledged to be due to the representatives of the original sufferers from the spoliation, and not that the decision with the Court of Claims might arrive at should be the subject of an appeal to this court; and that when such fact had been ascertained by the Court of Claims, upon evidence sufficient to satisfy that court, it was to be certified by the court to the Secretary of the Treasury, and such certificate was to be final and conclusive."

United States vs. *Lee*, U. S. Sup. Ct. 1882, 106 U. S. 196, MILLER, J. The doctrine examined and affirmed that except where Congress has so provided, the United States cannot be sued.

United States vs. *O'Keefe*, U. S. Sup. Ct. 1870, 11 Wallace 178, DAVIS, J. Right of citizens of Great Britain to sue United States in Court of Claims.

United States vs. *Realty Co.*, U. S. Sup. Ct. 1896, 163 U. S. 427, PECKHAM, J. Nature of claims against governments. Status of Alabama claims.

United States vs. *Weld*, U. S. Sup. Ct. 1888, 127 U. S. 51, LAMAR, J. Status of Alabama claims and jurisdiction of Court of Claims over cases arising from treaties.

Williams vs. *Heard*, U. S. Sup. Ct. 1891, 140 U. S. 529, LAMAR, J. *Comegys* vs. *Vasse*, 1 Peters, 193, again affirmed and applied. *United States* vs. *Weld*, 127 U. S 51, distinguished.

Wylie vs. *Coxe*, U. S. Sup. Ct. 1853, 15 Howard, 415, MCLEAN, J. Controversy over award, including attorney's right to compensation, settled.

§ 444.

[1] NOTE ON THE JURISDICTION OF THE UNITED STATES COURT OF CLAIMS.

The Court of Claims was established by an act of Congress passed February 4, 1855 (10 Stat. at L., p. 612; Devereux's Ct. Clms. Rep., App. p. 16). Section 1 of this act gave the court jurisdiction to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or

been stated, the cases cited in the notes to the foregoing sections relate to the disposition of the award as between parties

implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

The present jurisdiction of the court is determined by the act of Congress of March 3, 1887, commonly called the "Tucker Act" (24 Stat. at L., p. 505). This act gives the court jurisdiction over "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*," this shall not include jurisdiction over claims "growing out of the late civil war and commonly known as 'war claims,'" or claims "which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same" (sec. 1). The United States district and circuit courts are given concurrent jurisdiction in certain cases (sec. 2). The jurisdiction thus granted "shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act" (sec. 4). The right of appeal previously existing is continued (sec. 9). Heads of Departments (sec. 12), and either House of Congress (sec. 14) may refer pending claims to the court which shall report back on such cases. "All laws and parts of laws inconsistent with this act are hereby repealed" (sec. 16).

Previous to this act the laws determining the jurisdiction of the Court of Claims were contained in the U. S. Revised Statutes, §§ 1049 to 1093, inclusive, and §§ 188, 707, 708; in the act of March 3, 1863 (12 Stat. at L., p. 820); in the act of July 4, 1864 (13 Stat. at L., p. 381); in the joint resolution of June 18, 1866 (14 Stat. at L., p. 360); in the act of February 21, 1867 (14 Stat. at L., p. 397); in the act of July 27, 1868 (15 Stat. at L., p. 243); in the joint resolution of December 23, 1869 (16 Stat. at L., p. 368); in the joint resolution of March 3, 1871 (16 Stat. at L., p. 600); in the act of March 1, 1879 (20 Stat. at L., p. 324); in the act of June 16, 1880 (21 Stat. at L., p. 284); and in the act of March 3, 1883, commonly called the "Bowman Act" (22 Stat. at L., p. 485).

Whether the "Tucker Act" repealed these former statutes or not raises many questions. The only one that need be discussed in this work is whether it repealed § 1066 of the United States Revised Statutes which is as follows:

"Sec. 1066. The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

claiming the same, and not to the merits of the claim as between the citizen of the United States, and the foreign gov-

Under this section the Court of Claims had constantly refused to take jurisdiction of any claims "dependent on any treaty stipulation" unless they were referred to it by a special act of Congress. *Kinkead* vs. *United States*, U. S. Ct. of Claims, 1883, 18 Ct. Claims, 504, DRAKE, Ch. J.; and see 24 Stat. at L. 358, cited later in this note. Since the passage of the "Tucker Act," this question has not been definitely decided. In one case the Court of Claims held that section 1066 is a restriction "upon cases defined in sections 1059 and 1063 of the Revised Statutes, cases in which final judgment is entered, and it cannot be held to apply to the jurisdiction since given by the act of 1883" (the "Bowman Act") which allowed the heads of departments and committees of Congress to send cases to the Court of Claims. The court held that the "Bowman Act" was not superseded by the "Tucker Act," and uttered a very strong dictum to the effect that the "Tucker Act" did not repeal the restriction of section 1066 of the Revised Statutes. *Chickasaw Nation* vs. *United States*, U. S. Ct. of Claims, 1887, 22 Ct. Claims, 222, at pp. 246–248, DAVIS, J. *See also: The Thingvalla Line* vs. *The United States*, U. S. Ct. of Claims, 1889, 24 Ct. Claims, 255, 261, RICHARDSON, Ch. J. This question is also touched on but not decided in *United States* vs. *Weld*, U. S. Sup. Ct. 1888, 127 U. S. 51, 56, LAMAR, J. *See also: Williams* vs. *Heard*, U. S. Sup. Ct. 1891, 140 U. S. 529, 545, LAMAR, J., same case *sub nomine Heard* vs. *Sturgis*, Mass. Sup. Ct. 1888, 146 Mass. 545, HOLMES, J.; and notes on the Revised Statutes of the United States, by John M. Gould and George F. Tucker, 1889, p. 369. See n. 2, § 443, p. 288, *ante*.

The Court of Claims, as a matter of fact, has never taken jurisdiction under these general statutes over a claim growing out of treaty stipulation in which the court renders a final judgment, except where it acts in an advisory capacity under the "Bowman Act," or under section 12 of the "Tucker Act." *Thingvalla Line* vs. *United States*, U. S. Ct. of Claims, 1889, 24 Ct. Claims, 255, 261, RICHARDSON, Ch. J. Such jurisdiction has, however, often been conferred by a special act of Congress, and when so conferred is exercised by the court.

In 1878 Congress referred the "Caldera" claims to the Court of Claims to be decided in the same manner as all other cases before that court, but limited such recovery to the amount of the balance remaining of the Chinese indemnity fund, paid to the United States by China under the treaty of November 8, 1858 (20 Stat. at L., p. 171).

The "French spoliation" claims were referred to the Court of Claims by the act of Congress of January 20, 1885 (23 Stat. at L., p. 283). These were the "claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French Republic concluded" September 30, 1800. The act excluded claims embraced in the convention of 1803 with France, claims paid in whole or in part under the treaty of the United States with Spain in 1819, and claims allowed under the treaty of 1831

ernment upon which reclamation is made. There are instances, however, in which our courts have been clothed with jurisdiction to determine the merits of a claim against a for-

between the United States and France (sec. 1). The court was given jurisdiction to "examine and determine the validity and amount" of such claims, "together with their present ownership," "according to the rules of law, municipal and international, and the treaties of the United States applicable to the same" (sec. 3). The court was directed to report its conclusions to Congress for action, and all claims not presented in two years were barred (sec. 6). See also note 2 to § 442, p. 283, *ante*.

By act of January 17,1887, (24 Stat. at L., p. 358,) Congress conferred jurisdiction on the Court of Claims to hear the claims of three persons for the rent and value of certain buildings in Alaska. The statute recites that these claims had been previously presented to that court and dismissed for want of jurisdiction only. These cases involved the construction of the convention of 1867 with Russia whereby Alaska was ceded to the United States. *See also* note 2, § 394, p. 157, *ante*.

Upon the recommendation of the Secretary of State, Congress, by act of December 28, 1892 (27 Stat. at L., p. 409), directed the Attorney-General of the United States to bring suit in the Court of Claims against the La Abra Silver Mining Company "to determine whether the award made by the United States and Mexican Mixed Commission [under the convention of 1868 with Mexico] in respect to the claim of the said La Abra Silver Mining Company was obtained," in full or in part, by fraud (sec. 1). The Court of Claims was given jurisdiction to "hear and determine" this case (sec. 2); and an appeal was allowed to the United States Supreme Court (sec. 3). The President and Secretary of State were authorized to dispose of the funds, previously paid by Mexico on account of this award, in accordance with the final decision of this case. (Secs. 4 and 5.)

Under the same date an identical statute was passed (27 Stat. at L., p. 410), which referred the claim of Benjamin Weil, to an award made by the same commission, to the Court of Claims; and conferred the same powers on that Court and on the President and Secretary of State.

This legislation is remarkable in that it in effect set aside a judicial decision of a commission established by a convention with a foreign nation, and thus not only violated the doctrine of *res adjudicata* but virtually overruled a treaty by subsequent legislation. For further references to the *La Abra* and *Weil* cases, see note 8 to this section, pp. 309 and 310, *post*.

For compilations of the statutes affecting the jurisdiction of the Court of Claims, see the various volumes of the reports and especially: 22 Ct. Claims, pp. ix–xx, 1887, giving the "Tucker Act;" 14 Ct. Claims, pp. xxiii–lxviii, 1879; Digest of Court of Claims Reports from March, 1863, to December, 1875, and of appealed cases in the Supreme Court, by Charles C. Nott and Archibald Hopkins, Washington, D. C., 1876, pp. xliii–lxxxvii; 1 Ct. Claims, pp. xxi–xxxv, 1867.

eign government, but this jurisdiction must be conferred by a special act of Congress as it does not otherwise exist; and no right of appeal exists to a higher court unless the statute specially provides therefor.[2] As a general rule the cases which have been referred to existing courts have been those in which the United States for its own political purposes assumed to pay certain claims of one or more of its citizens against a foreign government. In such cases the court upon which jurisdiction is conferred determines the legal ques-

RULES.

Rules of the Court of Claims (United States), adopted January 7, 1895, and of the Supreme Court relating to appeals. Washington, Government Printing Office, 1895. *See also* the various volumes of the reports, especially: 20 Ct. Claims, pp. ix–xxxii, 1885; 14 Ct. Claims, pp. iii–xxii, 1879; Digest of Court of Claims Reports from March, 1863, to December, 1875, and of appealed cases in the Supreme Court, by Charles C. Nott and Archibald Hopkins, Washington, D. C., 1876, pp. ix–xxv; 1 Ct. Claims, pp. vii–xx, 1867.

For a general account of the Court of Claims, see: History, Jurisdiction and Practice of the Court of Claims of the United States, by William A. Richardson, LL. D, one of the Judges of the Court, 7 So. Law. Rev. N. S. p. 781, February, 1882; 17 Ct. Claims, p. 3.

[2] *In re Atocha*, U. S. Sup. Ct. 1873, 17 Wallace, 439, FIELD, J. The United States attempted to appeal from the decision of the Court of Claims in this case and asked for a mandamus against the court for a certificate of appeal, the court having refused on the ground that its decision was final under the statutes referring the *Atocha* case to it.

This position was sustained by the Supreme Court and it held that, as the original jurisdiction of the court excluded all claims under treaty stipulations, when jurisdiction over such claims is conferred by special act the authority of that court to hear and determine, and of the Supreme Court to review, is limited and controlled by the special act. In this respect it said: (p. 445.)

"In the present case, no such general reference was made of the claim of Atocha, nor was any such extended authority over it conferred. The court was directed to make a specific examination into the justice of the claim against Mexico, and whether it was embraced within the treaty; and if the court was of opinion that the claim was a just one and was embraced within the treaty, it was required 'to fix and determine' its amount, and when so determined, the act declares that the amount shall be paid. The matter was referred to the court to ascertain a particular fact to guide the government in the execution of its treaty stipulations. The court has acted upon the matter, and as no mode is provided for a review of its action, it must be taken and regarded as final."

tions involved according to the principles of international law as the same have been recognized by the Courts of this country,[3] or by international tribunals.

That claims of citizens of the United States against foreign governments do not lose their character of international claims, when adjudicated by United States tribunals specially clothed with jurisdiction thereover, was determined in the French Spoliation cases which have already been referred to,[4] and were decided as though the Court of Claims were an international tribunal.[5]

The claims of citizens of the United States against foreign governments, assumed by the United States, have been determined either by specially conferring jurisdiction on the Court of Claims or by creating special Commissions for that purpose.[6] A full list of all the commissions created to deter-

[3] For decisions as to principles of international law forming a part of the law of the United States see: *The Paquette Habana*, U. S. Sup. Ct. 1900, 175 U. S. 677, 700, GRAY, J. *Hilton* vs. *Guyot*, U. S. Sup. Ct. 1895, 159 U. S. 113, 163, GRAY, J. See also § 399, p. 187, *et seq.*, *ante*.

[4] For a list of French Spoliation cases heard by the Court of Claims and the United States Supreme Court see note 2 to § 442, p. 283, *ante*.

[5] *Cushing* vs. *The United States*. U. S. Ct. of Claims, 1886, 22 Ct. Claims, 1, 29, DAVIS, J.

[6] The statute referring the "French Spoliation" claims to the Court of Claims is given in the note on the jurisdiction of that court. See note 1 to this section, p. 299, *ante*, at p. 301.

By article IX of the Treaty of 1819 with Spain (U. S. Tr. and Conv. 1889, p. 1019) the United States and Spain mutually relinquished certain claims of their citizens upon the other nation. By a series of acts of Congress (3 Stat. at L., p. 768; 6 *idem*, p. 569; and 9 *idem*, p. 128) certain judges were authorized to receive and adjust these claims, and to report their decisions to the Secretary of the Treasury, who was authorized to pay any award "on being satisfied that the same is just and equitable and within the provisions" of the treaty.

By article XI of this same treaty (U. S. Tr. and Conv. 1889, p. 1020) the United States agreed to pay claims of its own citizens against Spain up to $5,000,000, and to appoint a commission of three to decide upon their amount and validity. A subsequent act of Congress (3 Stat. at L., p. 637) authorized the President of the United States to organize this commission.

By articles XIV and XV of the treaty of 1848 with Mexico (U. S. Tr. and Conv. 1889, pp. 687 and 688) the United States discharged Mexico from claims of American citizens, undertook to compensate them to the amount of $3,250,000, and agreed to appoint a commission to ascertain the amount and validity of such claims. Congress

mine international private claims of citizens of the United States up to the date of its publication will be found in Moore on International Arbitration to which the reader is referred; some of the more important and recent commissions of this character are given in the note.[7] It would be impossible to collate all of the cases in which claims of citizens of the United States against foreign governments have been before Courts and Commissions specially empowered to adjudicate them. Some of these cases have afforded opportunities for our Courts to determine the status of such claims and the rules applicable thereto and a few are referred to in the notes to this section.[8] The extracts from

promptly passed an act (9 Stat. at L., p. 393) authorizing the President and Senate of the United States to appoint a commission of three for this purpose.

For the commission under the treaty of 1898 with Spain see note 5 to § 308, pp. 447 *et seq.*, vol. 1.

[7] During the last twenty years international Commissions of award have been appointed as follows:

Under the Convention of 1880 with France (U. S. Tr. and Conv. 1889, p. 356) and an act of Congress (21 Stat. at L., p. 296).

Under the agreement of 1885 with Haiti (U. S. For. Rel. 1885, p. 500).

Under a Convention of 1885 (28 Stat. at L., 1053) and two of 1888 (28 Stat. at L., pp. 1064 and 1067) with Venezuela.

Under the Protocol of 1891 between Great Britain, Portugal and the United States (Moore's International Arbitrations, p. 1874).

Under the Convention of 1892 with Chili (27 Stat. at L., p. 965).

Under the Conventionof 1892 with Venezuela (28 Stat. at L., p. 1183).

Under treaty of 1898 with Spain (30 Stat. at L., p. 1757) and act of Congress (31 Stat. at L., p. 877).

[8] *Angerica* vs. *Bayard*, U. S. Sup. Court, 1887, 127 U. S. 251, BLATCHFORD, J. Case arising out of the United States and Spanish Claims Convention of 1871. Angerica recovered an award of $822,594, which was collected and paid over to him but without interest. There was about ten years delay. The claimants' executor asked for a *mandamus* to compel the defendant, then Secretary of State, to pay the interest collected during that period on the investments representing the money; a letter had been written by Mr. Evarts, the former Secretary, to the effect that during the interim the State Department "will expect to keep this reserve invested in interest-bearing securities of the United States to cover the delay in its distribution to the claimants." The petition was denied.

The court held that "the case fell within the well-settled principle that interest is not allowed on claims against the United States, unless the government has stipulated to pay interest, or it is given by express statutory provision;" and that "no claim for the allowance of interest could be predicated on the language of any notification, or

the opinions have been selected with the view of showing that there is a distinction between such claims and claims

circular or letter which issued from the Department of State, during the administration of a predecessor of the Secretary; no binding contract for the payment of interest was thereby created; and the present Secretary" could disregard such letter.

Atocha vs. *United States*, Court of Claims, 1872, 8 Ct. of Clms. 427, DRAKE, Ch. J.; U. S. Sup. Ct. 1873, 17 Wall. 439, FIELD, J. In 1844, during the existence of the treaty of 1831 with Mexico, Atocha was expelled from Mexico against the remonstrances of the American minister, on account of his personal relations with Santa Anna. The treaty of 1848 provided for the payment by Mexico of a fund in gross to cover all claims of American citizens. Atocha filed a claim, which was dismissed. Subsequently, February, 1865, an act was passed directing the Court of Claims to examine Atocha's case, and if just to make an award which should be paid out of the treasury, provided it did not exceed the balance remaining from the Mexican fund.

That court held that his expulsion was not only "causeless but in violation of treaty stipulations and, therefore, on both grounds wrongful, and it follows that at the time thereof he had a just claim against Mexico;" it also decided that when the treaty of 1848, was ratified his claim was still a just one for $82,201. Interest was allowed for the whole period (28 years), which increased the claim by $121,651, making it in all $207,852.

The balance remaining in the Mexican fund at the time was $207,449, which was awarded to Atocha's administrator.

The Government claimed that as the claim had become one against the United States no interest could be allowed; the court held that as the claim had been rejected by the Commission it was not against the United States, but should be treated as a claim against Mexico, and that the claimant was entitled to interest as on a claim against a foreign government because it was not in the nature of moneys retained by the United States on which no interest was allowed.

The Court of Claims followed the precedent set by the Claims Commission, and fixed interest at five per cent.

United States vs. *Diekelman*, U. S. Sup. Ct. 1875, 92 U. S. 520, WAITE, Ch. J. Reversing *Diekelman* vs. *United States*, U. S. Ct. of Claims 1872, 8 Ct. Clms. 371, LORING, J.; see also 9 Ct. Clms. 320.

This case, which arose from the detention of the Essex in the harbor of New Orleans by the United States fleet in 1862, when New Orleans was captured by the Union forces, had been in the Court of Claims and had also been the subject of diplomatic correspondence.

Rules of international law and the right of the conquering forces to regulate commerce, and to maintain blockade after capture, were involved.

The court held that, unless treaty stipulations provided otherwise, a merchant vessel of one country visiting the ports of another for the purpose of trade is, so long as she remains, subject to the laws which

against our own Government, and causes of action against individuals, which are adjudicated by the municipal law as the same is administered by our own courts.

govern it; and that if a vessel enter a port under a proclamation by which the blockade is released but not removed, she consented, by availings of the privileges and conditions, that while in such port she shall not take out goods contraband of war; that the city and territory was subject to martial law; and that on attempt to violate any of these provisions the detention was lawful.

It was also held as stated in the fifth point of the syllabus:

"5. Where the detention of the vessel in port was caused by her resistance to the orders of the properly constituted authorities whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed, —*held*, that her owner, a subject of Prussia, is not 'entitled to any damages' against the United States, under the law of nations or the treaty with that power. 8 Stat. 384."

The opinion says (p. 528):

"We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

"2. As to the treaty.

"The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

"Art. XIII of the treaty of 1828 contemplates the establishment of blockades, and makes a special provision for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. Clearly the United States had the right to exclude Prussian vessels, in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out of contraband goods is unreasonable, or that its performance may not be enforced by

It has been the peculiar province of the Senate Committee on Foreign Relations to consider such claims of our citizens against foreign governments as have reached a condition

refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two governments there is no such stipulation to the contrary. In the treaty of 1799, Art. VI is as follows: 'That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after.' While other articles in the treaty of 1799 were revived and kept in force by that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow, that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

"Art. XIII of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. The vessel must be 'stopped' in her voyage, not detained in port alone. There must be 'captors,' and the vessel must be in a condition to be 'carried into port' or detained from 'proceeding' after she has been 'stopped,' before this article can become operative. Under its provisions the vessel 'stopped' might 'deliver out the goods supposed to be contraband of war,' and avoid further 'detention.' In this case there was no detention upon a voyage, but a refusal to grant a clearance from the port that the voyage might be commenced. The vessel was required to 'deliver out the goods supposed to be contraband' before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in court to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty 'by purchase' at a stipulated price.

"As we view the case, the claimant is not 'entitled to any damages' as against the United States, either under the treaty with Prussia or by the general law of nations."

requiring the negotiation of treaties for their settlement or adjudication. Pursuant to a Congressional resolution the

THE LA ABRA AND WEIL AWARD CASES.

La Abra, etc., vs. *United States*, U. S. Sup. Ct. 1899, 175 U. S. 423, HARLAN, J.; also *United States* vs. *La Abra Silver Mining Company*, U. S. Ct. of Claims, 1894, 29 Ct. Clms, 432, WELDON, J.

Frelinghuysen vs. *Key* and *La Abra Silver Mining Company* vs. *Frelinghuysen*, U. S. Sup. Ct. 1884, 110 U. S. 63, WAITE, Ch. J.; *United States ex rel. Boynton* vs. *Blaine* (the *Weil* case), U. S. Sup. Ct. 1891, 139 U. S. 306, FULLER, Ch. J.

These four cases grew out of the La Abra and Weil awards under the Mexican claims treaty of 1868. The various points decided in each of the cases appears in the syllabus. The general point maintained was that the United States would have the right to set aside awards, made by a commission and decided by the umpire in favor of the claimants and against the foreign nation, and return the money to the government against whom the award was made, where there was clear proof that the testimony on which the claims were supported was false and had been fraudulently manufactured and obtained.

A very full account of the points decided in these cases and all the proceedings connected therewith appears in Moore's International Arbitration, vol. 2, pp. 1324–1348.

The points decided in this case (29 Ct. Cls. 432) are stated in the syllabus as follows:

"The treaty with Mexico, 1868, provides instead of a sum in gross that individual claims shall be investigated by a commission and the awards of the umpire be final and conclusive. The defendants present a claim, the umpire makes an award and Mexico pays the amount of it to the United States, but alleges that it was procured by fraud and perjury. Before the money is paid over to the claimants Congress passes an act conferring jurisdiction on this court to hear and determine the allegations of fraud with power to vacate and set aside the award."

"I. The sacredness of an international award should be upheld by the judiciary. But where the government against which it was made has complied with it, the government in whose favor it was made may question the *bona fides* of the claim and invoke judicial aid and return the money.

"II. When a citizen applies to his government to press his claim against a foreign power, he does so subject to the wise and judicious discretion which a nation has a right to exercise in determining its duty to itself, the citizen, and the foreign power.

"III. It is part of the sovereign right of a government, if at any time before the consummation of the transaction it becomes satisfied of the falsity or injustice of a claim, to abandon all further action on behalf of its citizen.

"IV. So long as money received from a foreign power remains in the hands of a government it is its duty as sovereign in the discharge of its moral and international obligations to inquire and ascertain its duty with respect to the fund, not only toward the citizen for whom it has received the money, but toward the government from which it was derived.

reports of that committee, relating to many claims of this nature from 1789–1900, have recently been compiled and pub-

"V. The Act 18th June, 1878 (20 Stat. L. p. 144), requesting the President to investigate charges of fraud in regard to the claims of Weil and La Abra Mining Company was only an expression of the desire of Congress to have the charges investigated. The Act 28th December, 1892 (27 id., p. 409), provided an appropriate and effective means of investigation in a judicial forum, being the 'domestic tribunal' anticipated by the Supreme Court in *Boynton* vs. *Blaine*, (139 U. S. R. 306.) Neither act limited or increased the constitutional diplomatic powers of the President.

"VI. The statutory recognition of a claim to an international award in the custody of the government changes its character from that of a mere appeal to the grace of the sovereign to a right susceptible of judicial determination. Against such a claim the government, as trustee of the fund, may file a bill in the nature of a bill of interpleader, or to quiet title; and such a proceeding will not conflict with the diplomatic authority vested in the President by the Constitution.

"VII. The United States, by the act of 1892 conferring jurisdiction on this court, suspended their relation to the fund as sovereign, and recognized a right in the defendants, but subjected that right to the provisions of the statute which recognized it.

"VIII. When a citizen insists upon a recognition and adjustment of a claim, he imposes a legal obligation upon himself to become subject to the jurisdiction of such court as Congress may empower to adjudicate the claim, and it is within the constitutional power of Congress to impose necessary and proper terms and conditions in the act of jurisdiction. Thus Congress may provide that if an award which is the subject of litigation was procured by fraud, the parties may be barred from all claim on the faith of the award, and the money be returned to the government from which it was received."

Meade vs. *United States*, U. S. Sup. Ct. 1869, 9 Wallace, 691, CLIFFORD, J. This is an appeal from the case in the Court of Claims, (2 Ct. Claims, 224,) affirming the decision rejecting his petition for indemnity.

The syllabus is lengthy, but it contains the facts and the decision, and is as follows:

"1. The claims of American citizens against Spain for which by the convention (subsequently becoming the treaty) of February 22d, 1819, the United States undertook to make satisfaction to an amount not exceeding $5,000,000 were such claims as, at the date of the convention, were *unliquidated*, and statements of which had been presented to the Department of State, or to the minister of the United States. And within this class, on the said 22d of February, were the claims of the late Richard W. Meade. And this was the only class that the commissioners appointed subsequently, on the ratification of the treaty, to pass upon claims, had power to pass upon.

"2. The convention as signed February 22d, 1819, subject to ratification within six months, though it was not ratified within the time stipulated, was never

lished. Much valuable historical information is contained therein, as well as the views of some of the eminent leaders

abandoned, though some expressions in the notification of August 21st, 1819, by the United States to Spain (notifying to that government that after the next day, 'as the ratifications of the convention will not have been exchanged,' all the claims and pretensions of the United States will stand in the same situation as if that convention had never been made), indicated that the United States might be induced to refuse to carry it into effect.

"3. This notification did not, by the non-ratification within the six months, make revocable the power which citizens of the United States, by filing their claims with it, had given their government to make reclamations against Spain in their behalf, nor did Mr. Meade in point of fact revoke the power which he had so given his government.

"4. Mr. Meade having subsequently to the appointment of commissioners presented to them his claims, not in an unliquidated form, but in the shape of a debt acknowledged by Spain in a judgment against it given by a royal junta, or special judicial tribunal of that country, made after the above-mentioned notification by the United States, the commissioners properly rejected the claims thus made. They did not reject his claims in their unliquidated form, and as filed previously to the convention, in the Department of State and with the American minister.

"5. The fact that before the said commission rejected the claim of Mr. Meade in the form in which he had presented it—the form, namely, of an award or judgment by a Spanish tribunal for a sum certain—he requested the government of the United States to procure from the Spanish government his original vouchers and evidences of debt, under a clause of the treaty which obliged the Spanish government to furnish, at the instance of the said commissioners, all such documents and elucidations as might be in their possession for the adjustment of the unliquidated claims provided for by the treaty, does not, even assuming that it shows that he meant to present his claims in an unliquidated form, show any cause of action against the United States over which the Court of Claims could exercise jurisdiction.

"6. The award of the tribunal of the Spanish government in favor of Mr. Meade, made on the 19th May, 1820, was not, in that form, included by the 5th article of the convention of February 22d, 1819, renouncing certain unliquidated claims then existing.

"7. There having been no evidence in a finding of the Court of Claims that an assurance, which that court found as matter of fact had been given by the minister of the United States at the court of Madrid, to the government of Spain, that a debt due by the last named government to Mr. Meade would certainly be paid, if a treaty whose ratification had been suspended was ratified, and which treaty was afterwards ratified, was given in pursuance of any instructions from the President or by virtue of any authority from the United States, the said assurance is

of the Senate on points of constitutional and international law affecting claims of this nature.[9]

to be regarded as having been given without authority, and therefore to be held void.

"8. This court does not agree with the Court of Claims in its opinion that, on the facts found by it, the United States by the acceptance of the treaty of Spain of February 22d, 1819, and the cession of the Floridas, unincumbered by certain private grants, to a recognition of which as valid our government had objected, appropriated the property of Mr. Meade, and that he acquired a good claim against them for $373,879.88, for which they were not liable legally and judicially except by and through the investigation, allowance, and award of the commissioners appointed under the treaty. But they do agree with that court in the opinion that the decision of the commissioners, dismissing the claim in the form in which it was presented to them, barred a recovery in the Court of Claims on merit. And that the joint resolution of Congress of July 25th, 1866, referring the case back to the Court of Claims after it had been once decided adversely to the claimant, was not a waiver of the bar, and did not allow that court to consider it upon merits irrespectively of the dismissal by the commissioners.

"9. This court, in conclusion, expresses its regret, that entitled as Mr. Meade clearly was to prove his unliquidated claims before the commissioners he did not do so, and they observe that now the only remedy of his representatives is by 'an appeal to the equity of congress.'"

[9] FOREIGN RELATION COMMITTEE REPORTS.

SENATE DOCUMENT NO. 231 (8 PARTS) 56TH CONGRESS, SECOND SESSION.

Compilation of Reports of Committee of Foreign Relations, United States Senate, 1789–1901, First Congress, First Session, to Fifty-Sixth Congress, Second Session. Government Printing Office, Washington, 1901, 5 volumes, each part constituting a separate volume (7328 pages in all), as follows:

Published pursuant to a Resolution adopted by the Senate of the United States January, 15, 1901, and as authorized by an Act of Congress approved June 6, 1900 (Deficiency Appropriations to June 30, 1900). See p. 1, Vol. I of this report. Volume I, part 1, contains this prefatory note:

"The reports in this Compilation include all those known and procurable made by the Committee on Foreign Relations of the Senate from the First to the Fifty-sixth Congress, inclusive. In making this compilation search was made through the original files of the Senate, the American State Papers on Foreign Relations, the Legislative and Executive Journals of the Senate, the Annals and Debates of Congress, the Congressional Globe and Record, and the bound volumes of the Senate Reports.

HAWKINS TAYLOR,
Compiler and Clerk, Commiteee on Foreign Relations."

WASHINGTON, D. C.
March 28, 1901.

In many cases the question arises whether a claim is *National* or *individual.* If the former, the Government has exclusive control over it, and can, therefore, release the foreign government or pursue such course as the political department of this Government determines. If, however, the claim is an individual one the rights of the claimants are protected by the provisions of the Constitution already referred to in the previous section.[10] For the reasons stated in the note this question and the distinction between National and individual claims is not discussed at length in this book.[11]

There is a separate index to each volume of matters therein contained, and a general index referring to volumes, but not pages thereof, at the end of volume VIII.

The general subdivision of the subject-matter of the Document, and the heads under which the reports are classified, are as follows:

Volume I, Part 1 (686 pages), claims of citizens of the United States against Foreign Governments.

Volume II, part 2 (1061 pages), same, but entirely devoted to claim of La Alba Silver Mining Company against Mexico.

Volume III, part 3 (831 pages), same; and also claims of Citizens of the United States against the United States, claims of Citizens of Foreign Governments against the United States, Claims against the United States of Diplomatic and Consular officers of the United States for Reimbursement and Extra Pay.

Volume IV, part 4 (877 pages), Mediterranean Commerce, etc., Nominations, Authorizations to accept Decorations from Foreign Governments, International Exhibitions, International Conferences, Maritime Canals, Pacific Cables, Railroads, Trade and Commerce with Foreign Nations, Tariff Restrictions.

Volume V, part 5 (944 pages), Trade and Commerce with Foreign Nations, Foreign Tariffs, Boundary and Fishery Disputes.

Volume VI, part 6 (1176 pages), Diplomatic Relations with Foreign Nations, Hawaiian Islands.

Volume VII, part 7 (1029 pages), Diplomatic Relations with Foreign Nations, Affairs in Cuba.

Volume VIII, Part 8 (723 pages), Treaties, and Legislation respecting them, General Index.

[10] See § 442, pp. 285, *et seq.*, *ante*, and cases there referred to following *Comegys* vs. *Vasse*, U. S. Sup. Ct. 1828, 1 Peters, 193, STORY, J.

[11] At the present time there are pending before the Spanish Treaty Claims Commission many cases involving the right of survivors, and relatives of victims, of the Explosion of the *Maine* in Havana Harbor, February 15, 1898, in which the author of this book is counsel for the claimants who have filed claims under the provision of the Act of March 2, 1901, (31 U. S. Stat. at L. pp. 877–880) already referred to (see note 5 to § 308, pp. 442, *et seq.*, vol. I) on the ground that Spain

§ 445. **Wide extent of this power both as to claims of citizens and of States; fishery treaties with Great Britain as they affect State ownership of fisheries.**—We have seen in the preceding sections that no higher exercise of the right of eminent domain has ever been assumed by any government; so far-reaching in its scope is it, that citizens whose claims are thus obliterated have no remedy whatever until Congress shall see fit, first to provide some procedure by which the claims can be proved to exist, and subsequently to appropriate money for payment of the claims as proved.[1]

The property affected by treaties includes not only claims of citizens but also property of States. The waters of such lakes as are within the boundaries of adjoining States, and of the ocean within the three-mile limit, belong, so far as there are property rights in the soil beneath the water, and to the fishes in the water, to the States and not to the United States, which only has a paramount right of regulating the navigation thereover.[2] Notwithstanding this, the United

was originally liable for the damages occasioned by that disaster and, therefore, the United States is now liable under the assumption clause of the treaty of 1898 (See INSULAR CASES APPENDIX at end of Volume I for treaty in full). One of the legal questions involved in those cases is whether the entire claim including indemnity for death and injuries of those on board is a national claim for which only the United States Government could make any claim, or whether individual claims attached in favor of those who were injured and the families of those who were killed. As the author is now engaged in preparing a brief argument in support of the latter proposition, it would obviously be improper for him to express his personal views in a book of this nature.

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[1] The judgments of the Spanish Treaty Claims Commission established by the Act of March 2, 1901, will only be paid after Congress shall have appropriated the money therefor. This has always been the custom in regard to claims of this nature against the government.

[2] *Illinois Central Railroad Co.* vs. *Illinois*, U. S. Sup. Ct. 1892, 146 U. S. 387, FIELD, J.

Shively vs. *Bowlby*, U. S. Sup. Ct. 1894, 152 U. S. 1, GRAY, J.

Lawton vs. *Steele*, U. S. Sup. Ct. 1894, 152 U. S. 133, BROWN J. Ownership and right to control fisheries in the Great Lakes which are boundary waters are here considered. The court held that it was within the power of the State to preserve from extinction fisheries in waters within its jurisdiction by prohibiting the exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.

States has on several occasions, notably in the treaties with Great Britain of 1854 and 1871, bartered away the exclusive rights of the States over the fisheries in those waters in exchange for reciprocal provisions granted in the territorial waters of Great Britain adjoining the British North American provinces, not to the citizens of the respective States affected but to all American fishermen.[3]

It has also been settled that the United States cannot regulate either the lake or deep sea fisheries in the absence of treaty stipulations; if it did so it would be making rules and regulations, not for territory of the Union, but for territory and property which belongs exclusively to the States, and which are exclusively under their several jurisdictions. Although this is the law in the absence of treaty stipulations,[4] the author believes, and has already expressed his opinion to that effect[5] that the United States possesses ample power to regulate fisheries in the lakes and within the three

Manchester vs. *Massachusetts*, U. S. Sup. Ct. 1891, 139 U. S. 240, BLATCHFORD, J.

See also Senate Document, No. 231, 56th Congress, 2d Session, 1901, part 5, vol. V.

Note 5 (p. 318), *post*, contains other authorities on this point.

[3] Treaty of 1854, arts I and II, U. S. Tr. and Con., ed. 1889, pp. 448–450; Treaty of 1871, arts. XVIII, *et seq.*, U. S. Tr. & Con., ed. 1889, p. 478, see pp. 486, *et seq.*

[4] Report No. 2382, House of Rep., 49th Congress, 1st Session, May 13, 1886, submitted by J. R. Tucker from the Committee on the Judiciary: Fishing in the Navigable Waters of the United States.

[5] MEMORANDUM ON CONSTITUTIONAL QUESTIONS INVOLVED IN SETTLEMENT OF QUESTIONS RELATIVE TO THE PROTECTION OF THE FISHERIES IN BOUNDARY WATERS.

(Submitted by the author to the Anglo-American Joint High Commission, October, 1898)

The question now under consideration is how the preservation of valuable property rights can be mutually secured for two nations, who are now deriving large benefits therefrom, which, under proper treaty stipulations and reciprocal legislation, will annually increase, but which, in the absence of such stipulations and legislation, must decrease as, under existing conditions, the fisheries are rapidly deteriorating and practically doomed eventually to destruction. It will be treated under the following heads:

1. The nature of the boundary waters, and the different kinds of waters in which the fisheries exist.

2. The jurisdiction over those waters by the States and the Federal Government on one side, and the Dominion and the Provinces of Canada on the other.

mile limit, in pursuance of any stipulations which might be included in any treaty made with His Majesty, the King of Great Britain, in regard to the fisheries, in those

3. The power of the United States to regulate such fisheries under the treaty-making power.

4. The enforcement of such regulations, in case the United States should exercise the treaty-making power and regulate such fisheries thereunder.

I.

THE NATURE OF THE BOUNDARY WATERS AND THE DIFFERENT KINDS OF WATERS IN WHICH THE FISHERIES EXIST.

An examination of the Report of Messrs. Rathbun and Wakeham shows that several different classes of waterways are included in the various boundary waters between the United States and Canada. At either end there are ocean waters; the central boundary waters consist of the Great Lakes, which are inland seas; at various places along the boundary there are rivers and lakes—some of which are navigable, and some of which are not. No general rule, therefore, can be applied except the one broad rule that as all of them are adjacent to States forming part of the Union, they are all territorial waters, not of the United States, but of the separate States respectively, the differences between them being simply how far the United States can exercise jurisdiction thereover, as to admiralty and maritime matters in the Federal courts, and as to the regulation of commerce and navigation by the legislative and executive departments of the Government.

Any attempt to claim jurisdiction over the Great Lakes or in the tidal waters would not be sufficient, as it would entirely omit the right to regulate fisheries in the unnavigable lakes and streams, the protection of which is equally essential on account of the spawning grounds, contamination of water, &c.

An examination of the decisions of the United States Supreme Court in regard to the rights and ownership of fisheries results necessarily in awarding that ownership and the control thereof to the States.

It was very early settled by the Supreme Court that the ownership of the land under the water adjacent to each of the ocean States, to the three-mile limit of sovereignty, belonged to the respective States, and not to the Federal Government. This decision resulted from a recognition of the fact that had the independence of the States forming the Union been separately recognized by Great Britain by the treaty of peace, there would have been no question as to the sovereignty of each State over the waters adjacent to it; and, as the spirit of the Union was that there should be State Sovereignty over every part of it, it was but consistent to grant the sovereignty of the waters adjoining each State to the respective States themselves.

When the Northwest Territory was divided into States, the boundaries of each State, as it was organized and admitted to the Union, were designated where lakes intervened, without regard to land or water, the boundaries passing indiscriminately over land and through the water,

waters, although in the absence of treaty relations such regulations would be wholly outside of its power and domain.

so that several of those States include portions of the Great Lakes and the entire lake system eventually was divided between them.

At the present time every one of the lake States includes within its boundaries portions of the Great Lakes, those portions in many cases constituting large parts of counties within the States, the respective sheriffs, coroners and other county officers exercising jurisdiction thereover.

In many instances the boundary lines pass through the middle of rivers, some of which are navigable, and some of which are not; and in those cases the State and county lines extend conterminously with the boundary line of the United States. As, therefore, there are now no territories along the northern boundary of the United States, all the waters on the boundary line are under the jurisdiction of States.

A misconception as to the nature of the waters in the Great Lakes may to some extent have arisen since the decision, in 1893, of the Supreme Court in the case of the *United States* vs. *Rodgers*, (150 U. S. 249), to the effect that the waters of the Great Lakes are "high seas." As a matter of fact, that decision, which was by a divided Court—three of the Judges dissenting, in a very able opinion—only determined, that for the purpose of establishing criminal jurisdiction of the United States Courts under the clause of the Constitution which gives Congress the right to define and punish felonies on the high seas, those portions of the Great Lakes which are *beyond* the boundary lines, and therefore not within the jurisdiction of any State of the Union, are, for the purposes of conferring such jurisdiction, to be considered as high seas, in the same manner that those portions of the ocean that are beyond the three-mile limit have always been considered high seas.

It is not the purpose at this time to discuss the relative merits of the minority and majority opinions of the Court in that case; but suffice it here to say that the rule was not applied to those waters that are *within* the boundary lines of the United States, and they cannot, under that decision, be characterized as high seas, because they are within the jurisdiction of the various States of which they form a part.

The Constitutions of the various lake and ocean States show to what extent the State boundaries include the waters adjacent to them. It must be considered as settled that there are no territorial waters of the United States, so far as property in the land under, or property in, the water is concerned, or the right to control the use of such water, except only as far as it is subject to the paramount right of the United States to regulate navigation and interstate commerce thereover.

A very interesting case in this connection is that of the *People* vs. *Tyler* (7 Mich. 161), in which the right of the States to exercise criminal jurisdiction over the Great Lakes was thoroughly discussed and sustained, and, although this decision was to some extent criticised by Mr. Justice Field in the majority opinion of the *People* vs. *Rodgers*, it was not overruled as to the jurisdiction of the States within the boundary

The author considers that such a treaty and the legislation necessary to enforce it not only can be made, enacted and

lines, as the *Rodgers* case related to a crime which was committed on the other side of the boundary line.

II.

JURISDICTION OVER THE BOUNDARY WATERS BY THE STATES, THE FEDERAL GOVERNMENT AND THE DOMINION OF CANADA.

As early as 1820 Judge Washington decided, in the case of *Corfield* vs. *Coryell* (4 Wash. C. C. p. 371), that each State owned all of the tidal waters within three miles of its shores, and could reserve the fisheries therein to its own citizens exclusively, and punish citizens of other States who attempted to fish in State waters in violation of such protective statutes, by confiscation of vessel, plant and catch.

This view as to State ownership and jurisdiction has been sustained by the United States Supreme Court in a long series of decisions, including the cases of *Smith* vs. *Maryland* (6 Cranch, 286); *McCready* vs. *Virginia* (94 U. S. 391); and *Lawton* vs. *Steele* (152 U. S. 133), which is a very recent decision, and in which it was held that the waters of Lake Ontario are unquestionably within the jurisdiction of the State of New York, and that it is within the power of a State to preserve from extinction fisheries in waters within its jurisdiction by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of young, as well as mature fish, and, in fact, declaring not only that the enactment of the legislation was proper and legal, but also that it was the duty of the State to enforce it. The rule as to ownership of the States in the various waters bounding them can be summarized as follows:

The States are the owners of all the lands under water, and of the water thereover, adjacent to or within their respective boundaries, holding them, however, charged with a trust in favor of the people of the State for proper and general purposes, with a limited right of disposition, so far as it does not interfere with those rights, but also subject to the paramount right of Congress to regulate navigation thereover for the benefit of all of the citizens of the Union, or of other persons to whom Congress may give the right of such navigation.

This rule was adopted by the Supreme Court of the United States in the *Illinois Central Case*, in 146 U. S. 387, and, although the court divided as to the extent of the right of permanent disposition of the land under water, it was unanimous as to the general principle above enunciated. See also *Pollard* vs. *Hagan* (3 How. 212).

Nearly every State has adopted fishery laws. They are all independent of each other. Boundary lines between the States, and the counties of the States, adjoining the lakes are often vague and indefinite; but within those lines, when determined, the jurisdiction is complete.

There is only one case which in any way intimates that the United States might exercise some right as to jurisdiction as to fisheries in tide waters.

enforced, but that it is one of the instances to which Article VI of the Constitution, making treaties the supreme law of

In *Manchester* vs. *Massachusetts* (139 U. S. 240), the Supreme Court decided that the statutes of Massachusetts regulating the fisheries were constitutional, and also that Buzzard's Bay—although more than six miles wide—was wholly within the jurisdiction of the State. At the end of the opinion, the court said that if it were possible for the United States to exercise jurisdiction, the fact that it had not done so would give to Massachusetts that concurrent right which exists in many matters until Congress shall have exercised control thereover, such as the right to control pilotage and other matters. The remarks were wholly *obiter*, as the Massachusetts statute had been sustained on the ground of ownership and establish no basis for the inferential construction that had Congress exercised control, the law of Massachusetts would have been superseded. As a matter of fact, so far as the Great Lakes are concerned, the case of *Lawton* vs. *Steele* supersedes that of the *Manchester* case, for it holds that the waters are unquestionably within the jurisdiction of the State of New York.

There is another, what might be called "hint," of Federal jurisdiction in *Manchester* vs. *Massachusetts*, when the court says that possibly the Fish Commissioner under the Fish Commission Act might not have the power to take fish out of all waters of the different States if the United States did not have some such power.

This remark was also *obiter*, and it would be extremely dangerous to rely upon any implied powers arising from the Fish Commission Act, as it covers all classes of waters, not only tidal, but also lake, without defining them; and under no possible stretch of construction could the jurisdiction of the United States extend to unnavigable waters, such as are necessarily included in the Fish Act. The constitutionality of the Fish Commission Act has never been decided, and it probably never will be; it is for the benefit of every State in the Union that the Fish Commission should pursue the great work it has inaugurated and so successfully conducted up to the present time, and that the Fish Commissioner should be clothed with authority to take fish at any time and place, so that he would not be liable to the penal statutes of any States while making his experiments, which, in many instances, must involve the taking of fish at seasons which would be otherwise improper. This view of the case would undoubtedly be accepted by the States as a matter of courtesy, although possibly a strict construction of the act might result in a decision to the effect that it afforded no protection as against the statute of the State in which such waters are situated.

Passing from the American side of these boundary waters to the Canadian, we find exactly the same conditions of ownership and property rights in the provinces as exist in the States; but the British North America Act contains, among the delegated powers to the Dominion Parliament, a distinct provision empowering it to regulate "sea and inland fisheries," and the insertion of those four words in the British North America Act obviated all the constitutional difficulties on the

the land, anything in the law and Constitution of any State to the contrary notwithstanding, is peculiarly applicable and

Canadian side that must necessarily be encountered on the American side, as our Constitution contains no such provisions.

That clause, however, has been limited purely to regulation. When the Dominion attempted to dispose of, as well as to regulate, the fisheries, the Supreme Court of Canada held, within the last few years, that the power did not extend as far as that, and denied the right of the Dominion to sell exclusive licenses at any point in waters which are adjacent to, or included in, any of the provinces (the *Provincial Fishery Case*, 26 Canada Supreme Court Reports, p. 444). The same view of the law was taken by the Privy Council in England, which affirmed the judgment with a few modifications—but not in this respect—and at the present time it can be safely considered that the Dominion Parliament can make all laws necessary to protect all of the waters between the United States and Canada, and can also enforce them by penalties and punishments, and take cognizance of, and punish, any crimes which may be committed in any part of the waters—whether on one side of the boundary or on the other—in case any treaty should be made in regard thereto, and providing therefor.

With the Federal Government of the United States, however, it is apparently different. There is no power to regulate fisheries expressed in our Constitution. In *McCready* vs. *Virginia*, above cited, as well as in other cases, it was distinctly held that the right to regulate fisheries is within the State, and not within the Federal jurisdiction; that it cannot be acquired by the United States, either under the regulation of navigation, the regulation of commerce, or the granting of immunity of citizenship; and, as there is no other method by which the United States can acquire the power, it would seem as though the opportunities of regulating and preserving these fisheries must either be lost, or left to such precarious protection as a dozen different States acting independently of each other can afford.

As the only possible solution of the question can be reached by the process of elimination, it will be well now to consider how far the States are able practically to protect these fisheries.

By the Federal Constitution, the States are prohibited from making any compact, either with each other or with any foreign power. Reciprocal legislation is almost equivalent to compact by treaty; it is extremely doubtful whether the States have the right to enter into any plan of reciprocal legislation with Canada; and, even if they had, there is absolutely no power which would legally or morally bind them, or any of them, not to modify or repeal such legislation; if the matter could be adjusted by uniform State and Provincial legislation there would be no assurance whatever of its continuance.

Assuming, however, that uniform legislation were adopted and continued, there is no guaranty of its enforcement. The boundary lines are uncertain, and the laws of one State could not be enforced, or infractions thereof punished, in another State; there would always be a

one in which the treaty-making power should be exercised for the benefit of the entire Union.

question as to the territorial jurisdiction of the spot in which the crime took place; and the expense of protecting the fisheries would probably be more than the States would care to expend.

Under these circumstances, it is apparent that there can be no complete protection of the entire fisheries, unless it is accomplished by means of a treaty between the United States and Great Britain, placing the control of all the fisheries in conterminous waters jointly under the two governments, with power to punish infractions, wherever the same may be committed, under such regulations as shall be made by reciprocal legislation of the Congress of the United States and the Parliament of the Dominion of Canada.

There can be no doubt, whatever, as to the right of the Dominion to enter into this treaty and prescribe the rules and regulations thereunder, and to punish infractions thereof. The question as to whether the United States can enter into that treaty, or not, involves some consideration of constitutional provisions; but an examination of the various authorities upon the subject clearly sustains the right of the Federal Government in this respect.

III.

THE POWER OF THE UNITED STATES TO REGULATE THESE FISHERIES UNDER THE TREATY-MAKING PROVISIONS OF THE CONSTITUTION.

There has already been submitted a statement as to the treaty-making power of the United States, and a compilation of the authorities in regard thereto; and suffice it to say in this brief memorandum that under the decisions therein referred to—principally—*Ware* vs. *Hylton*, (3 Dallas, 199), *Chirac* vs. *Chirac*, (2 Wheat. 259), *Hauenstein* vs. *Lynham*, (100 U. S. 483), *DeGeofroy* vs. *Riggs*, (133 U. S. 258), the United States possess, under the Sixth Article of the Constitution, a peculiar power to make treaties through the President and Senate which enables the Federal Government, whenever it undertakes to make a treaty within the proper lines of treaties as generally made between sovereigns, to go much further in regard to regulating matters within the jurisdiction of the States than the legislative department of the Government can go (see 8 Op. Atty. Genls. 411).

In *De Geofroy* vs. *Riggs*, cited *supra*, Mr. Justice Field held that "the treaty power extends to all proper subjects of negotiations between our government and the government of other nations." The question, therefore, to be decided, is whether or not the regulation of these fisheries is a proper subject of negotiation between the two governments interested therein. There can be no doubt in this respect as fisheries have been the subject of treaty stipulation for over a hundred years, not only between the United States and Great Britain, but other nations as well (treaties of Utrecht, 1713; Paris, 1763; Paris, 1783; London, 1818; Elgin Marcy, 1854; Washington, 1871).

The United States have already regulated by treaty matters which

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otherwise are wholly within the jurisdiction of the States, such as the enforcement of claims which were not enforceable under the State laws, descent of property and testamentary disposition in regard to aliens, which also in the absence of treaty rights are wholly under the regulations of the respective States. The cases sustaining these treaties are almost all cited in the appropriate portions of this work, and therefore are not repeated here.

The United States have regulated State fisheries under the treaty power on more than one occasion; by the treaties with Great Britain of 1854 and 1871 rights were given to Canadians to fish in waters within the three mile limit of every State, from Maine to Delaware, and no objection was ever raised in regard thereto.

This is clearly a case in which the treaty-making power should be exercised, in the absence of any other express power granted to Congress. It is manifestly necessary at the present time to find the power, as the evil cannot be remedied unless the power is found and exercised. It is shown that the States are prohibited, constitutionally, from exercising it, and unless the United States intervene, the remedy cannot be obtained.

In case it shall be exercised and the treaty sustained the remedy for an existing evil is complete. If not sustained the country is simply in the same condition it is now.

It was stated by one of the expounders of the Constitution that the object of vesting the treaty-making power in the United States was so that no single State could possibly disturb the harmony of the Union; that the impossibility of obtaining uniform legislation by thirteen different States had been demonstrated during the Confederation, and that the only safe method was to clothe the United States with the greatest possible power, so that the Federal Government could represent the States in making treaties which they could not make themselves.

Under this treaty-making power the United States can enter into an agreement with the Dominion of Canada to preserve the fisheries in all of the boundary waters; and the legislation which would subsequently be enacted by Congress, so long as it was consistent with the treaty, and necessary to attain the desired results and maintain the fisheries, would be in all respects constitutional.

Chief Justice Marshall has sustained the constitutional right of Congress to enact all legislation necessary to enforce all laws and treaties in the widest possible manner; and, wherever the United States can exercise any right under the Constitution, the power of legislation to make its laws and treaties effectual has been clearly demonstrated and sustained beyond all peradventure.

The question has been raised that, while the United States might, by treaty, grant rights to aliens to fish in our waters—which rights the States would have to respect regardless of their own laws—that it might be beyond the constitutional power of the United States to deprive a

extending the protection of the Government thereover throughout the United States;[1] the law was tested; the Su-

citizen of a State of his right to fish in the lakes, or to create any limitations in regard thereto, or punish him for infractions thereof, under Federal statutes in regard to fisheries in State waters.

This contention, however, seems to have been fully answered by the cases in regard to extradition.

It was long ago held that the United States had no right under the Constitution to deport or surrender a criminal, but, as soon as treaties were made with various foreign countries for the extradition of criminals, the Executive as well as the Federal Courts were immediately clothed with the power of extraditing criminals, so long as the requisitions were in conformity with the treaties.

As extradition treaties were made, Congress passed laws enforcing them; and, while there is no constitutional power given to Congress to deport any persons from the United States, or to confine them for crimes committed in territory under the jurisdiction of other countries, all of the extradition legislation has been sustained as constitutional. Here we have instances of Congress by legislation punishing, or aiding in the punishment of, criminals, for crimes wholly without the enumerated subjects of the constitution.

The analogy between the two subjects is complete. If Congress can make laws for the arrest, confinement, surrender and deportation of criminals under the extradition treaties, they certainly can make laws to punish infractions of such rules and regulations as may be necessary to enforce the preservation of valuable property rights belonging to this country and our next-door neighbors.

It must be borne in mind in this connection that the prime object would be protection and preservation of the property, and, therefore, the element of punishment of infractions of rules necessary for that object would be incidental, and within the power of Congress under the clause authorizing necessary and proper legislation to execute the law of the land.

IV.

THE ENFORCEMENT OF SUCH REGULATIONS.

Whatever treaty may be concluded between the two countries in regard to this matter should be as complete as possible in itself, both as to the manner and method of preserving the fisheries and of enforcing the contemplated regulations.

There have been many decisions in regard to the method of enforcing treaties; in the present instance, undoubtedly the treaty could not sufficiently enter into details to bring it within that class of treaties which can be enforced as to all its details by the Executive without legislative enactment.

The question of how far a treaty can be enforced by the Executive alone, and to what extent legislation is necessary to enforce it, has been

[1] For note 1 see p. 324.

preme Court in 1879[2] decided that property in trade-marks had been recognized and protected by the common law and the statutes of the several States; that it did not derive existence as property from the act of Congress providing for registering the designs in the Patent Office; that a trade-mark was neither an invention, discovery, nor writing, within the meaning of those provisions of the Constitution which conferred on Congress the power to secure the exclusive right therein to authors and inventors; that if acts of Congress protecting trade-marks could be upheld as regulations of commerce, it could only be so far as their use in commerce

discussed by the Supreme Court of the United States in many cases; the Court has always adhered to the rule laid down by Chief Justice Marshall in *Foster and Elam* vs. *Neilson*, (2 Pet. 253), that, when either of the parties engages to perform a particular act, the treaty addresses itself to the political and not the judicial side of the Court, and the legislature must execute the contract before it becomes the rule of the Court, and in order to be equivalent to an act of the legislature it must be able to enforce itself without any legislative assistance.

This question arose under several of the extradition treaties; in the *Metzgar* case the District Court of the United States held the prisoner, on the ground that an extradition treaty could be enforced by the President and a surrender of the prisoner made by him without any legislation. Judge Edmonds, in the New York Supreme Court, before whom the prisoner was brought on *habeas corpus*, however, decided diametrically opposite to Judge Betts, and discharged the prisoner, on the ground that the treaty had never been made effectual by legislation, and that legislation was required for that purpose.

The general consensus of opinion at the present time seems to be that a treaty should be supplemented by legislation as to details of regulation, punishment of infractions and appropriations of money. Therefore, any treaty which is made in regard to these fisheries would probably have to be supplemented by consistent and reciprocal legislation, both by the Dominion Parliament and the Congress of the United States; it probably would not, so far as the punishment of infractions of regulations is concerned, go into effect until such legislation had been adopted, although as to some of the regulations, such as policing, preserving and stocking the fisheries, and in any other respects in which the Executives could act through the various departments of the respective Governments, such legislation might not be necessary.

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[1] Act of March 3, 1871, 16 U. S. Stat. at L. p. 580, prohibiting as fraudulent trade-marks similar to those of foreign manufacturers.

Act of 1876, 19 U. S. Stat. at L. p. 141. See U. S. Rev. Stat. chap. 2, title LX, §§ 4937, *et seq.*

[2] *The Trade-mark Cases*, U. S. Sup. Ct. 1879, 100 U. S. 82, MILLER, J.

with foreign nations, or among the several States and with the Indian tribes was concerned; that, as the legislation did not come within those limits, it was void for want of constitutional authority.

The court expressly avoided a direct decision as to the right to regulate trade-marks by treaties, the opinion saying:

"In what we have here said we wish to be understood as leaving untouched the whole of the question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."[3]

§ 447. **Regulation and protection of trade-marks by treaty.**—Since that decision was rendered, however, the United States has entered into numerous treaties with foreign countries for the protection of trade-marks.[1] During recent years our Government has made special efforts to extend international protection to industrial property throughout all of the civilized countries of the world in the same manner as postal facilities have been extended; it has not only been

[3] This extract from the opinion is on p. 99, 82 U. S.

§ 447.

[1] See TREATIES APPENDIX at end of this volume for some of these treaties.

See also Senate Document No. 20; 56th Congress, 2d Session; Report of the Commissioners Appointed to Revise the Statutes Relating to Patents, Trade and other Marks, and Trade and Commercial Names under Act of Congress Approved June 4, 1898. December 4, 1900. Referred to the Committee on Patents and ordered to be printed. Washington, Government Printing Office, 1900.

This is a report of Francis Forbes, Peter Stenger Grosscup and Arthur P. Greeley appointed under the Act of June 4, 1898, to revise the statutes relating to patents, trade-marks, etc. The Report is divided into two parts; the first relating to patents, and the second to trade and other marks, and commercial names. The Act appointing the Commission will be found on p. 145.

The history of the treaty relations of the United States with foreign countries in regard to trade-marks and patents and the mutual protection thereof, together with the legislation of the United States and of foreign countries affecting the same has been collated in the various appendices to this Report. This Report consists in all of 529 pages. On pp. 141–144 will be found a table of contents in which the laws of the many foreign countries in regard to trade-marks are collated, and chap. 18, pp. 325–337 contains an abstract of the existing "Treaty agreements relating to trade-marks between the United States and foreign nations" alphabetically arranged.

represented at, but has taken a prominent part in, the international congresses, which have been held for this purpose.

Pursuant to treaty stipulations the courts have protected the right of foreign holders of trade-marks in this country, and numerous decisions have been made as to the validity of trade-marks and the rights of foreigners in this country under our treaty stipulations with foreign countries.[2] If Congress has

[2] *Lacroix Fils* vs. *Sarrazin*, U. S. Cir. Ct. E. D. La. 1883, 4 Woods, 174, 15 Fed. Rep. 489, PARDEE, J. The question involved in this action is stated in the opinion, the whole of which is as follows: "This court takes judicial notice of the public treaties between the United States and foreign countries. Where a citizen of France has, in compliance with the trade-mark laws of the United States, duly registered a trade-mark, he need not, in bringing an action against a citizen of Louisiana for violation of his rights in such trade-mark, allege that there is in force a treaty between the United States and France affording privileges in France to citizens of the United States similar to those given by the trade-mark laws of the United States."

Trade Mark Cases, U. S. Sup. Ct. 1879, 100 U. S. 82, MILLER, J. In this case it was decided that the trade-mark laws were unconstitutional as being outside of the power of Congress, except in so far as it related to commerce with foreign nations among the several states and with the Indian tribes.

The points decided in this case are stated in the syllabus as follows:

"1. Property in trade-marks has long been recognized and protected by the common law and by the statutes of the several states, and does not derive its existence from the act of congress providing for the registration of them in the Patent Office.

"2. A trade-mark is neither an invention, a discovery, nor a writing, within, the meaning of the eighth clause of the eighth section of the first article of the Constitution, which confers on Congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

"3. If an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in 'commerce with foreign nations, and among the several States and with the Indian tribes.'

"4. The legislation of Congress in regard to trade-marks is not, in its terms or essential character, a regulation thus limited, but in its language embraces, and was intended to embrace, all commence, including that between citizens of the same State.

"5. That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress."

In regard to the right to regulate trade-marks by a treaty, the court expressly left that point undecided, the opinion closing with the following words (p. 99):

"In what we have here said we

not the general power to regulate and protect trade-marks, it does possess the power to protect the citizens of foreign

wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect.

"While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the act of 1870, and the civil remedy which that act provides, it was because the criminal offenses described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits and unlawful use of trade-marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

"The question in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be so certified to the proper circuit courts."

Richter vs. *Reynolds*, U. S. C. C. A. 3d Circ. 1893; 17 U. S. App. 427, DALLAS, J. Trade-mark case under treaty with Germany, 1871.

The point involving treaty rights is disposed of in the opinion as follows (pp. 434, 435):

"The courts of the United States take judicial notice of its treaties with other countries, but where a treaty is relied on the burden is on the party asserting it to inform the court when in fact without knowledge of the subject, of its existence and terms. In this case it does not appear that the point was considered by the court below, but the brief for the complainant informs us that the treaty which he invokes was made between the United States and Germany in 1871, to 'remain in force for ten years, and in case neither party gave notice was extended each year for an additional year.' The brief adds: 'it is therefore understood that its terms are still effective.' Article 17 of the treaty is quoted as follows: 'With regard to the marks of labels of goods, or of their packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States of America, and American citizens shall enjoy in Germany, the same protection as native citizens.' We accept this statement and the quotation; but what stipulation does the latter disclose of which the complainant has not had the benefit? His right to enjoy the same protection as, under the laws of the United States, is enjoyed by citizens of the United States has been fully recognized and the question raised by him as to the effect in this country of his alleged acquisition of a right in Germany to the mark which he claims in this suit has been adjudicated in a manner, and under the laws of this country, precisely the same as any similar question would be adjudicated if presented to the same court for decision by one of our own citizens. To more than this the complainant was certainly not entitled. The plain intent of the treaty is to insure reciprocally to the citizens of the respective countries the protection of the laws of the other. It was not intended to give to the

countries in their property rights in trade-marks, in accordance with the terms and stipulations of the treaties that have been entered into between the United States and their respective governments. The Courts in many instances have upheld this power, as appears by the decisions cited in the notes. The digests should be consulted for the most recent cases, as many interesting points are constantly arising. Treaty provisions in regard to copyright are not referred to in this chapter because copyright[8] is a matter under the control of the Federal Government by express Constitutional provisions.

official acts or laws of either country any peculiar extraterritorial effect.

"It follows from what has been said that the mark used by the defendants is not used in violation of any right of the complainant, and therefore the decree of the Circuit Court dismissing his bill with costs is affirmed."

La Republique Francaise vs. *Schultz*, U. S. Cir. Ct., S. D. N. Y. 1893, 57 Fed. Rep. 37, TOWNSEND, J. Article XIII of the general trade-mark treaty of 1883 with France, and general protection of trade-marks thereunder, discussed.

Baltz Brewing Co. vs. *Kaiser Brauerei, Beck & Co.*, U. S. C. C. A., 3d Circ. 1896, 39 U. S. App. 229, WALES, J.

The word "Kaiser" can be adopted as a trade-mark. The intent of article XVII of the German treaty of 1871 and of article I of the Austrian Convention of 1871 is to insure reciprocally to the citizens of the respective countries protection of the laws of the other concerning trade-marks; it is not intended to give to official acts or laws of the other country any peculiar extraterritorial effect.

Saxlehner vs. *Eisner, etc., Hunyadi Janos Water* cases, U. S. Cir. Ct. App., 2d Circ. 1899, 63 U. S. App. 139, *et seq.*, LACOMBE, J. *Held*, that the Trade-Mark Convention with the Austria-Hungarian Emperor of 1872 is not to be construed as holding that when the public in this country has acquired through the owner's *laches* the right to use a trade-mark, and a trade name, that such right is overcome whenever by the operation of some subsequent Hungarian Act, the trade name and trade-mark is secured to him in Hungary.

Holzapfel's Compositions Co. Ld. vs. *Rahtzen's American Composition Co.*, U. S. Sup. Ct. (decided Oct. 21, 1901, not yet reported) PECKHAM, J. In this case the rights of English manufacturers to a trademark were not sustained.

[8] For protection of copyright internationally is largely provided for by reciprocal legislation and executive proclamation, see note under § 460, chapter xvi, *post*.

The copyright laws of the United States have been compiled recently and issued as bulletins Nos. 1, 2, 3, 4 (three parts), by the Copyright Office of the Library of Congress.

The Revised Statutes, §§ 4948, *et seq.*, as amended in 1891 provide for reciprocal protection. See 26 U. S. Stat. at L., pp. 1106, *et seq.*

§ 448. **Ex-Territoriality; consular courts of foreign countries in the United States.**—It is a well-settled rule of American law that foreign countries cannot establish tribunals of any nature within the limits of the United States without the consent of this Government.[1] Grave interna-

§ 448.

[1] *The Antelope*, U. S. Sup. Ct. 1825, 10 Wheaton, 66, MARSHALL, Ch. J. In this case a slave ship found hovering near the American coast was brought into port and an effort was made to condemn the vessel under the general law of nations on the ground that the slave trade was contrary thereto. The vessel being Spanish and Portuguese was not affected by any treaty or by any of the municipal laws of this country, and Chief Justice Marshall held, following Sir William Scott (Lord Stowell's) opinion, in *The Louis*, 2 Dodson's Reports, 238, that although any nation might denounce the slave trade for itself and its own citizens, it could not go beyond that except by a treaty, and could not condemn a vessel belonging to another nationality in the absence of a treaty. See especially p. 122 as to the equality of nations and the rule that one nation cannot enforce its laws in the territory of another.

The Belgenland, U. S. Sup. Ct. 1883, 114 U. S. 355, BRADLEY, J. In this case the general right of United States courts to take jurisdiction in cases of collision upon the high seas between vessels of different nationalities, both foreign, was discussed at length, and according to the syllabus it was held that such a matter was a proper subject of inquiry in any Court of Admiralty which first obtained jurisdiction; that the United States courts might in their discretion take jurisdiction; that there were various circumstances which might determine a court to refuse, in its discretion to take jurisdiction; but that when the controversy between foreign vessels arises under the common law of nations, the court should take jurisdiction in the absence of special reasons shown to the contrary.

One of the reasons given why a court might exercise this discretion not to take jurisdiction was the existence of treaty stipulations in regard to which the court says (p. 363):

"For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it

tional complications arose during Washington's second administration over the attempt made by Citizen Genet, then minister from France to the United States, to establish prize courts in our ports for the condemnation of prizes taken by French vessels of war; the principle just enunciated was formulated at that time, and has ever since been maintained as an integral part of the law of this country.[2]

will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catherina*, 1 Pet. Adm. 104; *The Forsoket*, 1 Pet. Adm. 197; *The St. Oloff*, 2 Pet. Adm. 428; *The Golubchick*, 1 W. Roberts, 143; *The Nina*, L. R. 2 Adm. 428, and Eccl. 44; S. C. on appeal, L. R. 2 Priv. Co. 38; *The Leon XIII*, 8 Prob. Div. 121; *The Havana*, 1 Sprague, 402; *The Becherdass Ambaidass*, 1 Lowell, 569; *The Pawashick*, 2 Lowell, 142.

"Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwine Kreplin*, 9 Blatchford, 438, reversing s. c., 4 Ben. 413; see s. c. on application for mandamus, *Ex parte Newman*, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign States. See Treaties and Conventions, Rev. Ed. 1873, Index, 1238.

"In the absence of such treaty stipulations, however, the case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction."

[2] *Glass* vs. *Sloop Betsey*, U. S. Sup. Ct. 1794, 3 Dallas, 6, 16, PER CURIAM. "No foreign power can of right institute, or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and in pursuance of treaties. It is, therefore, decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right," and referred to in Wharton's Digest, vol. I, p. 2.

The courts of the United States and of the several States are clothed with complete jurisdiction to administer justice on any and every occasion that can possibly arise between litigants whether citizens or foreigners. Before the proper court any person, whether he be a foreigner or a citizen, can seek and obtain redress for injuries received or rights withheld; it is only through such courts that justice can properly be administered; one exception to this general rule, however, is where consuls of foreign countries have by treaty stipulations been clothed with jurisdiction to hear and determine certain classes of cases in which citizens of their respective countries are interested; in those cases the courts of this country lose their jurisdiction, and the power of the consul to hear and determine the cause is exclusive.[3]

[3] *The Belgenland*, U. S. Sup. Ct. 1884, 114 U. S. 355, BRADLEY, J.

Weiburg vs. *The St. Oloff*, U. S. Dist. Ct. Pa. 1790, Fed. Cases, 17,357, PER CURIAM. Same case, 2 Peter's Adm. 428.

The Burchard, U. S. Dist. Ct. S. D. Ala. 1890, 42 Fed. Rep. 608, TOULMIN, J. *Held* that American seamen shipped on a German vessel from Buenos Ayres before the German consul could not, on arrival at Mobile and before they were discharged, libel the ship for wages, as the German consul had exclusive jurisdiction under treaty of 1871. Also held that, if they had been discharged, the United States courts would have had jurisdiction after they ceased to be seamen of the vessel.

See also *Feol* vs. *Salamoni*, U. S. Dist. Ct. Ga. 1886, 29 Fed. Rep. 534, SPEER, J.

Leavitt vs. *The Shakespeare*, U. S. Dist. Ct. La. 1871, Fed Cas. 8167, DURELL, J. American seamen libeled a Bremen ship for wages after completing the voyage at New Orleans and leaving the vessel. The captain, a German, set up as a plea to the jurisdiction of the court the treaty of 1852 with the Hanseatic League giving the consul jurisdiction over seamen's wages' cases on vessels of the Hanse towns. The court overruled the plea and held as follows:

"The plea to the jurisdiction of the court, like a demurrer, admits the truth of the allegations contained in the libel, to wit: That the libellants are citizens of the United States; that the voyage was as stated; that the voyage ended at New Orleans; and that the libellants earned wages as mariners, serving on board of the Shakespeare during the whole of said voyage. Now the court has come to the conclusion that the differences spoken of in the article cited from the treaty of April 30, 1852, and which are made subject to the judgment and arbitration of consuls, vice-consuls, commercial and vice-commercial agents, are differences of such a nature as might possibly, if aggravated, disturb the order and tranquillity of the country—differences which touch the discipline of the ship. Certainly,

The powers of consuls to act as judges to the exclusion of the courts of the countries to which they are accredited are,

the naked question of whether wages are due or not due, is not a difference which can disturb either the order or the tranquillity of the country. Again the court does not consider it to have been the intention of the United States in making the treaty of April 30, 1852, to subject its citizens in a question of wages claimed or earned on board of a foreign ship, to the judgment or arbitration of a foreign consul or commercial agent; and this opinion of the court is supported by the last clause of the article cited, to wit: 'But this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort on their return to the judicial authority of their own country.' This clause contemplates the return of the complaining mariner to his own country, where he may appeal from the adverse decision given by his consul at a foreign port; thus evidently restraining the application of the provisions of the article to such of the mariners as are subjects or citizens of the country whose flag their ship bears. In the case before the court, the libellants are citizens of the United States. They are already at home, and they have a right to resort to the judicial authority of their own country. Let the plea be overruled and dismissed."

Williams vs. *Welhaven*, U. S. Dist. Ct. Ala. 1892, 55 Fed. Rep. 80, TOULMIN, J. The libellant, a citizen of the United States filed a libel for wages and damages against the Norwegian steamship, the *Welhaven*.

The Norwegian consul at Mobile, where the libel was filed interposed, claiming that the matter was under his consular jurisdiction pursuant to treaty with Norway and Sweden.

The court sustained the consul's contention in a brief opinion, the whole of which is as follows:

"It has been held that, where an act of Congress is in conflict with a prior treaty, the act must control, as it is of equal force with the treaty and of later date, (*Steamship Co.* vs. *Hedden*, 43 Fed. Rep. 17), hence the contention of libellant's counsel could be sustained if the statute which he invokes in this case (Rev. St. §§ 4079–4081) was in conflict with the treaty between the United States and Norway and Sweden, which must govern the action of the court in the matter under consideration, or if such statute had any application to the case at all. But my opinion is that it is neither; that it is not in conflict with the treaty; and that it has no application to a case of this character. The earnest desire of this court to afford to seamen every right and protection authorized by the law, and the sympathy I have with that class of people to which libellant belongs, strengthened by the able and impressive argument of his counsel, induced me to take for examination and careful consideration the matter and arguments submitted before a decision by the court denying the jurisdiction prayed for; but such consideration has only served to confirm the correctness of the decision of this court in the case of *The Burchard*, 42 Fed. Rep. 608, where it was held that the court had no jurisdiction in a case very similar to this one.

as a general rule, confined to controversies to which seamen of vessels of their own nationality are parties, or to the administration of effects of citizens of their country dying in the country to which they are accredited. A number of instances in which these judicial powers have been conferred on consuls have been referred to in the notes appended to this section; special reference will be made in the next section to two adjudications on the subject.[4]

§ 449. **The Elwine Kreplin, 1870; Wildenhus's Case, 1887.**—The treaty with Prussia of 1828 gives jurisdiction, under the conditions therein stated, to consuls of that country in controversies involving the wages of seamen on Prussian vessels; it also provides that the decisions of the consuls shall be carried into effect by local authorities.[1]

In the *Elwine Kreplin*[2] a United States District Judge, denied the exclusive jurisdiction of the Prussian consul at New York, and against his protest took cognizance of the claims of Prussian seamen against a Prussian vessel on the

In addition to that case, I cite, as sustaining the decision in this, *The Salomoni*, 29 Fed. Rep. 534; *The Marie*, 49 Fed. Rep. 286; *The Elwine Kreplin*, 9 Blatchf. 438; *In re Ross*, 140 U. S. 453, 11 Sup. Ct. Rep. 897. I am, therefore, constrained to sustain the exceptions to the libel, and order that the libel be dismissed."

Jordan vs. *Williams*, U. S. Cir. Ct. Mass. 1851, 1 Curtis, 69, Fed. Cas. 7528, CURTIS, J. Rights of United States consuls over seamen on American vessels in foreign ports discussed and general rules laid down.

The Marie, U. S. Dist. Ct. Ore. 1892, 49 Fed. Rep. 286, DEADY, J. The syllabus is: "Any person who, in pursuance of any arrangement or contract, for a long or a short period or voyage, is on board of a Norwegian vessel, aiding in her navigation, is a member of the crew of such vessel, within the purview of article 13 of the treaty of 1827 between the United States and the kingdom of Norway and Sweden, and the consul of that country has exclusive jurisdiction of any difference arising between him and the master of such vessel; and it matters not if such person is an American citizen, and shipped at an American port."

In re Ross, U. S. Sup. Ct. 1891, 140 U. S. 453, FIELD, J.

[4] For right of consuls to administer estates, see note on p. 348, *post*. § 449.

[1] U. S. Treaties and Con. 1889, p. 916: Arts. X and XI; U. S. Treaties in Force, 1899, p. 515.

[2] *The Elwine Kreplin*, U. S. Dist. Ct. E. D. N. Y. 1870, 4 Benedict, 413, 8 Fed. Cas. 4426, BENEDICT, J. (Reversed U. S. Cir. Ct. E. D. N. Y. 1872, 9 Blatchf. 438, WOODRUFF, J.) Writ of error dismissed *sub nomine Ex parte Newman*, U. S. Sup. Ct. 1871, 14 Wallace, 152, CLIFFORD, J.

ground, as stated in his opinion, that the vessel could not be proceeded against *in rem*, so as to properly protect the rights of the seamen under any judgment that the consul might deliver.

The Circuit Court reversed this decision, holding that the District Court had no jurisdiction of the lien, or jurisdiction to enforce it in our ports; furthermore, that the reciprocal rights given to consuls of the United States in Prussian ports formed the basis for the consular jurisdiction in our ports; that the power of the courts to enforce the lien was sufficient to justify a proceeding *in rem*, as well as *in personam*, to enforce the judgment; that the rights of the seamen would be protected under the consular decision in all respects, and the United States courts, therefore, had no right to interfere. The Supreme Court refused to issue a writ of error in this case although the main question was not before it.

The extent of consular jurisdiction was also passed on by the Supreme Court in *Wildenhus's Case*,[3] in which an attempt was made to transfer a seaman on a Belgian vessel, who had committed homicide, from the jurisdiction of the local authorities to that of the consul who claimed that he had exclusive jurisdiction of the case.

Under the treaty with Belgium of 1880,[4] the Supreme Court refused to surrender the prisoner to the consul on the ground that there had been such a breach of peace that it affected the community at large, and had invoked the power of the local government whose people had been disturbed thereby; that such an act by its nature created a disorder in the language of the treaty, thus taking this particular case out of the jurisdiction of the consul and placing it within the jurisdiction of the local tribunals.

§ 450. **Ex-Territoriality; consular courts established by the United States in foreign countries.**—The last specific instance which will be referred to in this chapter in which the treaty-making power has been exercised in such

[3] *Wildenhus's Case*, U. S. Sup. Ct. 1887, 120 U. S. 1, WAITE, Ch. J. Affirming U. S. Cir. Ct. of N. J. 1886, 28 Fed. Rep. 924, WALES, J. Also reported *sub nomine Mali* **vs.** *Keeper of the Common Jail, etc.*

[4] U. S. Treaties and Con. 1889, p. 80, see Arts. XI–XV; U. S. Treaties in Force, 1899, p. 51.

a manner that it confers powers upon Congress and officers of the Government wholly beyond those conferred by the Constitution, is the establishment, maintenance and regulation of consular courts in foreign countries, having jurisdiction over citizens of the United States, with power to try and condemn them for crimes committed in foreign countries.[1]

Nothing more sacred can be imagined by the Anglo-Saxon mind than the right to a trial by jury in criminal cases. The Constitution as originally framed contained in section 2 of Article III the provision, "The trial of all crimes, except in cases of impeachment shall be by jury;" the 6th Amendment of the Constitution which extends "to *all* criminal prosecution" further assumes to accused persons in all instances the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, aud also that he shall be informed of the nature and cause of the prosecution, confronted with the witnesses, have compulsory process for obtaining witnesses in his favor, and the assistance of counsel for his defense.

In the notes to this section the author has quoted the notes made by Mr. Davis as amended by Mr. Haswell on the subject of Consular Courts.[2]

§ 450.

[1] *Field* vs. *Clark*, U. S. Sup. Ct. 1892, 143 U. S. 649, HARLAN, J., see p. 690.

United States vs. *Eaton*, U. S. Sup. Ct. 1898, 169 U. S. 331, WHITE, J.

In re Ross, U. S. Sup. Ct. 1891, 140 U. S. 453, FIELD, J., and see extracts from opinion in note 4 to § 390, p. 140, *ante*.

Mahoney vs. *United States*, U. S. Ct. Claims, 1867, 3 Ct. Claims, 152, NOTT, J. The status, rights and jurisdiction of consular courts discussed in this case.

Dainese's Case, Ct. Claims, 1879, 15 Ct. Claims, 64, DAVIS, J.

Dainese vs. *Hale*, Sup. Ct. Dist. Col. 1873, 1 Macarthur, 86, CARTER, J. U. S. Sup. Ct. 1875, 91 U. S. 13, BRADLEY, J. In these cases the right of the United States to establish consular courts and the history of exterritorial courts and the exterritorial jurisdiction exercised in foreign countries is discussed at length.

[2] NOTES BY DAVIS AND HASWELL ON CONSULAR COURTS AND EXTERRITORIALITY.

As the following notes prepared by J. C. Bancroft Davis and John H. Haswell, for the official publications of United States Treaties and Conventions of 1873 and 1889, are a very complete summary of the law

§ 451. Trial by jury not necessary in consular courts established by treaty.—Notwithstanding the broad expres-

on the subject of consular courts of the United States established in foreign countries, they are quoted at length with the citations. The extracts are taken from the edition of 1889, pages 1279–1285, and page 1289.

NOTE ON CONSULS.

A consul is not a diplomatic officer; is entitled to no diplomatic privilege; (2) and is not exempt from criminal prosecution for offenses against the laws of the country in which he resides. (3)

The second section of the third article of the Constitution provides that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls. This privilege is not a personal one, and is not waived by an omission to plead it in the court below. (4)

Consuls represent the individual subjects or citizens of their respective nations when there is no other representation, and, when duly recognized, are competent parties to assert or defend the rights of property of their fellow-citizens or subjects in a court of admiralty without special procuration; (5) but they cannot receive actual restitution of the property in controversy without a special authority. (6)

Various treaties have conferred upon foreign Consuls in the United States the power of determining disputes between masters and crews of the vessels of their nationality, and with the aid of the local authorities of arresting and returning deserters from such vessels. Without and independently of a treaty a consul has no such judicial power. (7) The act of apprehending and delivering the seamen under the Treaties and the acts of Congress to enforce them are judicial and not executive acts. (8)

The act to enforce Treaty provisions respecting disputes between masters and crews was approved June 11, 1864. (9) It is not to take effect as to the ships or vessels of any nation unless the President shall have been satisfied that similar provisions have been made by the other contracting party for the execution of the Treaty, and shall have issued his proclamation to that effect. On the 10th of February, 1870, proclamation was made under this act as to the Treaties with France, Prussia, and the other States of the North German Union, and Italy; (10) and on the 11th of May, 1872, as to the Treaty with Sweden and Norway. (11)

This statute authorizes any court of record of the United States, or any judge thereof, or any commissioner appointed under the laws of the

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(2) 1 Op. At.-Gen., 41, Bradford; Ib., 77, Lee; Ib., 406, Wirt; 2 Ib., 378, Berrien; Ib., 725, Butler. (3) 2 Dallas, 299, note. (4) *Davis* vs. *Packard*, 7 Peters, 276. (5) *The Bello Corunes*, 6 Wheaton, 152. (6) Ib. (7) 2 Op. At.-Gen., 378, Berrien; 6 Ib., 148, Cushing. (8) 9 Op. At.-Gen., 96, Black. (9) 13 St. at L. 121. (10) 16 St. at L. 1130. (11) 17 St. at L. 955.

sions "The trial of *all* crimes" in Article III, and "in *all* criminal prosecutions," in Amendment VI of the Constitu-

United States to take bail or affidavits, or for other judicial purposes whatsoever, to receive the application of the consular officer, to issue process against the person complained of, and if it shall appear, on his being returned before the magistrate, that he is not a citizen of the United States, and if a prima facia case shall be made out that the matter concerns only the internal order and discipline of the foreign vessel, and does not affect directly the laws of the United States or the rights and duties of any citizen, then the magistrate shall commit the seaman to prison to abide the lawful order or control of the master: provided the expenses of the proceeding shall be paid by the consular officer, and the seaman shall not be detained for more than two months after his arrest.

The statute respecting the restoration of deserters was approved March 2, 1829, and was entitled "An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States." (1) It provides "that on application of a consul or vice-consul of any foreign government, having a Treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States; and on proof, by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged at the time of desertion to the crew of said vessel, it shall be the duty of any court judge, justice, or other magistrate having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul to be sent back," etc.

Another series of Treaties grants to the consuls of the United States in the territories of certain Oriental powers exclusive jurisdiction over disputes between citizens of the United States, or over offenses committed by the citizens of the United States, or both.

The first statute to affirm and regulate this jurisdiction was approved on the 11th of August, 1848. (2) Attorney-General Cushing gave an exhaustive opinion on this statute. (3) In 1860, a new statute was passed, (4) which was amended in 1870. (5) Under these various statutes, the following is the present condition of the law and practice in this respect:

The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any Treaty of the United States, are invested with power to hear and determine cases in regard to civil rights where the debt or damage does not exceed $1,000 exclusive of costs, and also to issue warrants to arrest

(1) 4 St. at L. 359. (2) 9 St. at L. 276. (3) 7 Op. At.-Gen. 495; see also Ib., 565. (4) 12 St. at L. 72. (5) 16 St. at L. 183.

tion, the United States has entered into treaties with many foreign countries (generally Oriental), in which the right of

offenders, to arraign, try, and convict them, and to punish them to the extent of $100 fine, or to imprisonment not to exceed sixty days.

The provisions of the statute of 1860 apply directly to the consulates in China, Japan, and Siam. They apply in terms to Turkey, (see section 21 of the act of 1860,) so far as they relate to crimes and offenses; and as to civil cases, so far as the laws of Turkey permit.

The authenticity of the English version of the Treaty of 1830 with Turkey, under which exterritorial rights had been claimed and allowed, has been recently questioned. The present attitude of the question is set forth in the note entitled "Ottoman Porte."

The operation of the statute of 1860 is extended (6) to Persia, to Tripoli, Tunis, Morocco, and Muscat; (7) to Egypt (8) and to Madagascar, and all other countries with which Treaties may hereafter be made. (9)

The jurisdiction is to be exercised in conformity with—1st, the laws of the United States; 2d, with the common law, including equity and admiralty; and, 3d, with decrees and regulations, having the force of law, made by the Ministers of the United States in such country respectively, to supply defects and deficiencies in the laws of the United States, or the common law as above defined.

This power of the Ministers to make such laws and regulations is limited, by instructions from the Department of State, to acts necessary to organize and give efficiency to the courts created by the act.

Mr. Fish, on the 26th of February, 1873, instructed the Minister at Japan, on this subject thus: "The authority of a Minister, in an oriental country, to make regulations having the force of law within the country to which he is accredited, is derived from the act of 1860, entitled 'An act to carry into effect provisions of the Treaties between the United States, China, Japan, Siam, Persia, and other countries, *giving certain judicial powers* to ministers and consuls, or other functionaries of the United States in those countries, and for other purposes.'

"The first twenty-eight sections (except the 21st) relate to the treaties referred to in the title. The remainder of the act refers to the 'other purposes.' Sections one, four, and five therefore relate exclusively to the subject of carrying into effect treaty provisions *conferring judicial powers* on Ministers.

"The first section provides that 'to carry into full effect the provisions of the Treaties, etc., . . . the Ministers and the Consuls of the United States duly appointed to reside in each of the said countries shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such Treaty, respectively, *be invested with the judicial authority herein described.*'

"The fourth section defines how those powers are to be exercised: namely, in conformity with the laws of the United States, 'but in all cases where such laws are not adapted to the object,' *i. e.*, the exercise

(6) Section 28. (7) Section 29. (8) 14 St. at L. 322. (9) 16 St. at L. 183.

trial by jury and those other rights which are assured to accused persons, under the Anglo-Saxon principles of presump-

of such judicial powers,) 'or are deficient in the provisions *necessary to furnish suitable remedies*, the common law, including equity and admiralty, shall be extended in like manner over such citizens and others in the said countries; and if defects still remain to be supplied, and neither the common law, including equity and admiralty, nor the Statutes of the United States, *furnish appropriate and suitable remedies*, the Ministers in the said countries, respectively, shall by decrees and regulations, which shall have the force of law, supply such defect and deficiencies.'

"The fifth section provides that '*in order to organize and to carry into effect the system of jurisprudence* demanded by such treaties, respectively, the said Ministers, with the advice of the several Consuls in each of the said countries respectively, or so many of them as can be conveniently assembled, shall prescribe the forms of all processes which shall be issued by any of said Consuls, and . . . make all such decrees and regulations from time to time as the exigencies may demand; and all *such* regulations, decrees, and orders shall be plainly drawn up in writing, and submitted as above provided for the advice of the Consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, who shall each signify his assent or dissent in writing, with his name subscribed thereto; and, after taking such advice and considering the same, the Minister in the said countries, respectively, may, nevertheless, by causing the decree, order, or regulation to be published, with his signature thereto, and the opinions of his advisers inscribed thereon, make it to become binding and obligatory until annulled or modified by Congress.' . . .

"It is the opinion of the Department that this statute confers upon the Minister in Japan no authority to make a regulation requiring citizens of the United States to register their names, and no power to enforce such a regulation judicially.

"The authority conferred by the act is defined in the first section to be a *judicial* authority. By the fourth section the Minister is required to execute that power in *conformity with the laws of the United States*, with authority to vary from those laws in two cases only; 1. Where those laws are not adapted to the exercise of the judicial authority conferred by section one; 2. Where they are deficient in the provisions to furnish suitable remedies. In each of those contingencies the Minister has authoriy to make regulations in order '*to furnish suitable and appropriate remedies*,' and for no other purpose whatever.

"The fifth section is still more explicit on this point. Every power named in this section is recited to be conferred upon the Minister, '*in order to organize and carry into effect a system of jurisprudence.*'" (1)

The power of originating civil and criminal proceedings is vested by the statute in Consular officers exclusively.

They can also, sitting alone, determine all criminal cases where the

(1) 1 F. R. 1873, 571.

tion of innocence, are not recognized for the establishment of consular courts having exclusive jurisdiction over American citizens accused of crime in those countries.

fine imposed does not exceed five hundred dollars, or the term of imprisonment does not exceed ninety days; and may impose fines to the extent of fifty dollars, or imprisonment, not exceeding twenty-four hours, for contempt committed in the presence of the court, or for failure to obey a summons.

They may also, when of opinion that legal questions may arise in which assistance may be useful, or that a severer punishment is required, summon associates, not more than four in number, taken by lot from a list to be previously approved by the Minister, to sit with them on the trial, each of whom is to enter upon the record his judgment and opinion, and to sign the same; but the Consul himself gives the judgment in the case, whether it accords with that of his associates or not.

In trials for capital offenses there must be four associates, who must all agree with the Consul, in order to convict, and the opinion must be approved by the Minister before there can be a conviction.

They have exclusive jurisdiction in civil proceedings where the damage demanded does not exceed five hundred dollars.

When the amount demanded exceeds five hundred dollars, or when the Consul thinks the case involves legal perplexities, and that assistance will be useful, he may summon to his aid not less than two nor more than three associates, to be selected from a list of persons nominated by the Consul, for the purposes of the act, to the Minister, and approved by him. They shall hear the case with him. The Consul, however, is to give the judgment. If they agree with him, the judgment is final. If they, or any of them, disagree, the opinions of all are to be noted on the record and subscribed by them, and the judgment of the Consul is then subject to appeal.

Such a Consular court cannot, in a suit by a person not a citizen of the United States, entertain a set-off further than to the extent of the claim asserted by the plaintiff, and cannot render a judgment against a person of foreign birth not a citizen of the United States. (2)

An appeal may be taken in criminal cases from a decision of a Consul acting alone, where the fine exceeds one hundred dollars, or the time of imprisonment for a misdemeanor exceeds ninety-days.

If associates sit with the Consul in criminal proceedings, (except capital,) an appeal can be taken to the Minister only in case of disagreement between him and one of his associates.

In civil proceedings, in cases arising before the 1st day of July, 1870, an appeal can only be taken to the Minister from cases in which associates sit with the Consul, and in which there is not an agreement of opinion.

In cases arising after the 1st day of July, 1870, an appeal may be taken to the Minister from final judgment in the Consular courts of China

(2) 11 Op. At. Gen., 474, Speed.

It is apparent at once that this is a great and salutary protection to American citizens, and enables them to avoid many disadvantages which they would be under if they were

and Japan, where the matter in dispute exceeds five hundred dollars, but does not exceed two thousand five hundred dollars, exclusive of costs; and where the matter exceeds two thousand five hundred dollars, exclusive of costs, the appeal may be taken to the Circuit Court for the district of California.

There are also regulations for appeals from the judgments of ministers to the Circuit Court of California.

In Tunis, Morocco, and Tripoli, citizen of the United States committing murder or homicide upon a subject of those powers are to be tried by a mixed court, at which the Consul is to "assist."

The undisputed portion of the fourth article of the Treaty of 1830 with the Ottoman Porte provides for the supervision of the American Dragoman in the hearing of all litigations and disputes arising between the subjects of the Sublime Porte and citizens of the United States.

It is not in dispute that the usages observed towards other Franks are to be observed toward citizens of the United States. These usages are believed to be the following:

1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

2. Consular Courts for the business of each nation of foreign Christians.

3. Trial of questions between foreign Christians of different nations in the Consular Court of the defendant's nation.

4. Mixed tribunals of Turkish magistrates and foreign Christians at length substituted in part for cases between Turks and foreign Christians.

5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts; this arrangement introduced at first by the Legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the Legations of other foreign Christians.

A provision in a Treaty that a Consul may ex officio administer upon the estates of citizens of his nationality dying within his jurisdiction without legal heirs there, gives no right of reclamation against the United States for the value of the property of such a decedent improperly administered on by a State Court, unless the Consul first exhausts his remedies at law to prevent such State administration. (1)

Judicial powers are not necessarily incident to the office of consul, although usually conferred in non-Christian countries.

The Supreme Court of the United States has held that the treaties with the Ottoman Empire of 1830 and 1862 concede to the United States the same privileges in this respect as are enjoyed by other Christian nations, which may be exercised by the consuls. (2)

(1) 9 Op. At.-Gen., 383, Black. (2) *Dainese* vs. *Hale*, 91 U. S. S. C. 13.

tried by the local courts, in which they would not have the benefit of that presumption of innocence which is, as we have said before, the birthright of the Anglo-Saxon nation;

In the revision of the Statutes the acts to carry into effect treaty provisions with certain non-Christian countries (3) appear in Title 47.

In the enumeration of consular officers, upon whom judicial duties are devolved, consuls-general and vice-consuls were omitted in the revision of the Statutes. (4) The omission was rectified by an act of Congress approved February 1, 1876. (5)

The Federal court in California has considered the requisites in cases of appeal from the consular and ministerial courts of China and Japan to the Circuit Court of the district of California. (6)

A consul cannot be required to certify to the official character or acts of a foreign notary public. (7)

A consul has no authority, since the passage of the act of 1872, to demand and receive from the master of a vessel the money and effects of a deserter. (8)

The consular officers named in article 10 of the treaty of 1828 with Prussia, have exclusive jurisdiction in a claim made by the crew against the vessel for the recovery of wages. (9)

An act (1) of Congress approved March 23, 1874, authorized the President, when he should receive satisfactory information that the Ottoman government, or that of Egypt, had organized new tribunals likely to secure to citizens of the United States the same impartial justice enjoyed under the exercise of judicial functions by diplomatic and consular officers, pursuant to the act of June 22, 1860, to suspend the operation of such act and to accept for citizens of the United States the jurisdiction of such new tribunals. The Department of State having been informed of the organization of such tribunals in Egypt, the President, upon March 27, 1876, issued a proclamation (11) suspending, during the pleasure of the President, the operation of the act of June 22, 1860, within the dominions of the government of Egypt, so far as the jurisdiction of the new tribunals embraced matter cognizable by the minister, consuls, or other functionaries of the United States in said dominions, except as to cases in progress.

The question of the judicial authority of consuls over persons serving on American vessels in China and Japan has been construed as authorizing consular officers to assume jurisdiction where offenses are committed on shore by foreigners serving on board American merchant vessels, when such foreigners are citizens or subjects of countries having no treaty engagements upon the subject with China and Japan, or when,

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(3) June 22, 1860; July 28, 1866; July 1, 1870. (4) R. S., §§ 4083 to 4130. (5) 19 Stat. at L. 2. (6) *Steamer Spark* vs. *Lee Choi Chum*, 1 Sawyer, 713. (7) 12 Op. At.-Gen., 1, Stanbery. (8) 14 Op. At.-Gen. 520, Williams. (9) *The Elwine Kreplin*, 9 Blatchford, 438. (10) 18 Stat. at L. 23. (11) 19 Stat. at L. 662.

and it also enables them, if convicted, to escape the barbarous punishments inflicted in those countries in pursuance of customs repugnant to our own.

being subjects or citizens of treaty powers, their own consuls decline to assume jurisdiction. (5)

Persons serving on board national vessels who have committed offenses on shore in Japan and China are held to be subject to the jurisdiction of the consul of the country under whose flag they are serving. (6)

A sentence of imprisonment rendered by a consular court cannot be legally executed beyond the territorial jurisdiction of the court. Persons convicted at Smyrna or Constantinople cannot, therefore, be brought to the United States for imprisonment. (7)

But transfers have been made under conditional pardon. In January, 1880, one O'Neil was sentenced to twenty years' imprisonment for manslaughter by the consular court for Osaka and Hiogo, Japan. This sentence was commuted by conditional pardon to ten years' imprisonment, to be served in the United States consular jail at Kanagawa. In January, 1882, the President ordered his transfer to San Quentin, California. Mirzan was convicted of murder at Alexandria, Egypt, and sentenced to be hanged, but his sentence was commuted, July 29, 1880, to imprisonment for life in the United States prison at Smyrna. In August of 1882 the President directed that the prisoner be transferred to Albany, New York, and that the remainder of his sentence be served out at that place. (8) See, also, the case of John Ross, under title "Exterritoriality."

A consul of the United States in China cannot entertain a criminal charge against a citizen or subject of another power. (9)

In 1874 the German government raised objection to the taking of testimony by consuls of the United States in Germany except as provided by article 9 of the treaty of 1871 with the German Empire. The Department of State endeavored to induce the German authorities to permit testimony to be taken with the same freedom as in the United States, but without effect, it being stated that the law of Germany provided for letters rogatory in such cases. (10)

NOTE ON EXTERRITORIALITY.

The rights of exterritoriality enjoyed by citizens of the United States in certain Oriental countries are considered under the title "Consuls;" the Consular officers being the persons entrusted with the enforcement of those rights.

The Tribunal of Arbitration at Geneva held that "the privilege of exterritoriality, according to vessels of war, had been admitted into the law of nations, not as an absolute right, but solely as a proceeding

(5) MS. Dept. of State. (6) Ib. (7) 14 Op. At.-Gen. 522, Williams. (8) MS. Dept. of State. (9) 1 F. R. 1873, 139. (10) F. R. 1874, 462; 1 F. R., 1875, 537, 562, 573.

But while a plan of this nature may be adopted by a constitutional government for the benefit of its citizens, it can-

founded on the principle of courtesy and mutual deference between different nations." (2) This is in accordance with the settled practice of the United States. Attorney-General Lee, in the early days of the Republic, gave his opinion that it is lawful to serve either civil or criminal process upon a person on board a British man-of-war lying within our territory. (3)

The Secretary of State, in an instruction (4) to Mr. DeLong, dated December 20, 1870, informed him that it was understood by the Department of State that the power conferred upon a minister by sections 5 and 6 of the act approved June 22, 1860, was confined to providing a course of procedure in pursuing judicial remedies, and did not extend to the creation of new rights or duties, or to the modification of personal rights and obligations under existing law. The regulations for the consular courts in Japan proposed by Mr. DeLong which were of a mixed character, containing regulations as to procedure and new enactments, were submitted to Congress, (5) but no action was taken.

Upon several occasions the Department has expressed the view that no authority was conferred upon diplomatic officers to create new offenses, or prescribe new punishments for offenses. When regulations have been proposed containing penal provisions in reference to the sale of liquor, etc., it was held that such power was not conferred upon ministers or consuls. (6) In a dispatch (7) from the minister of the United States in Japan to the Secretary of State, it is stated that, with the exception of the consuls of Germany and Holland, it does not appear that consuls in Japan have authority to make regulations having the force of law.

Question has arisen as to the right of the government of Japan to enact regulations providing for security and good order, such as pilotage, municipal or hunting regulations, and to make them binding on foreigners. On such subjects it seems necessary that power to enact binding regulations should exist somewhere, and while a disposition has been manifested to put such regulations, when approved, in force as against foreigners, it has been insisted at the same time that all prosecutions against citizens of the United States for the infringement thereof must be conducted in the consular courts of the United States as provided by treaty.

The Japanese government has from time to time proposed hunting (8) regulations, and also fishing (9) regulations.

By an order in council of the 25th of October, 1881, the ministers of Her Britannic Majesty in China and Japan are authorized from time to time to make, subject to the provisions of the order, such regulations

(2) 4 Pap. Rel. Tr. W. 50. (3) 1 Op. At.-Gen. 87. (4) S. E. Doc. 25, 3d Sess. 41st Cong.; see also S. E. Doc. 20, 3d Sess. 40th Cong. (5) S. E. Doc. 25, 3d Sess. 41st Cong. (6) 2 F. R. 1875, 777, 782. (7) Ib. 799. (8) 2 F.R. 1875, 774. (9) Ib. 820, 829.

not be sustained unless it is in all respects legal and within the power of the government. Consular courts which have been organized, and as they still exist, in many of the Eastern countries, such as China, Turkey, Siam, and, until recently, Japan,[1] for the purpose of protecting American citizens from unfair trials and cruel punishments, have, when just punishment has been meted out to guilty American citizens, been subjected to the severest tests as to the legality of their

as may to them "seem fit for the peace, order, and good government of British subjects resident in or resorting to" China and Japan. (3)

In an instruction to Mr. Bingham, minister to Japan, under date of January 20, 1876, Mr. Fish expressed the opinion that citizens of the United States residing in the "foreign quarter" in Nagasaki might be sued by the municipal council in the consular court of the United States for non-observance of municipal ordinances. (4)

The question of criminal jurisdiction of consuls of the United States in Japan over foreigners duly enrolled as seaman on American merchant vessels has been much discussed, and in a recent case was decided by the Department of State, adversely to the opinion sometime formerly expressed, (4) in favor of such jurisdiction. John Ross, a British subject, shipped as a seaman on an American merchant vessel, murdered the second-mate on board the vessel, while in the port of Yokohama, was tried by the consul-general there, convicted, and on the 20th of May, 1880, sentenced to death. His sentence was commuted by the President, and he was removed to the United States to undergo life imprisonment at Albany, N. Y. "The British court at Yokohama claimed jurisdiction by reason of Ross's alleged British citizenship. The position taken by this government and adhered to was that the United States, in virtue of its legislation in extending the laws thereof over its citizens in foreign countries, 'and *over all others*, to the extent that the terms of the treaties, respectively, justify or require' (section 4086, Revised Statutes), and under the articles of the treaty with Japan, must consider a foreign seaman duly enrolled on an American merchant vessel as subject to the laws and entitled to the protection of the United States precisely to the same extent that a native-born seaman would be during the period of his service." (5)

No foreign power can rightfully erect any court of judicature within the United States, unless by force of a treaty. (6)

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(3) S. Mis. Doc. 89, 1st Sess. 47th Cong. (4) F. R. 1873, 139, Mr. Fish to Mr. Low, Jan. 8, 1873; also 11 Op. At.-Gen. 474, Speed. (5) S. E. Doc. 21, 1st Sess. 47th Cong. (6) *Glass* vs *The Sloop Betsey*, 3 Dallas, 6.

§ 451.

[1] The Consular Courts in Japan were abolished July, 1899, pursuant to treaty of 1894 (U. S. Treaties in Force, 1899, p. 352).

existence, and the right of the United States to establish and maintain them.

§ 452. **Consular courts sustained by Supreme Court in In re Ross, 1891; Justice Field's opinion.**—No severer test as to any rule of law can be imagined than to challenge it in a case involving the life, or even the liberty of an American citizen.

Under our treaties with Japan of 1857 and 1858, consular courts were established which had exclusive jurisdiction to try American citizens for crimes committed in Japan.

After the ratification of the treaties Congress passed laws for the establishment of consular, or treaty, courts in all countries with which the United States had such treaty stipulations, prescribing a regular form of procedure, defining the jurisdiction and power of the Courts, and providing for appeals to the United States Minister; the power included the right to inflict the death penalty on persons convicted of murder.

One Ross, a sailor on an American vessel, having committed a crime in Japan was brought before one of these courts, tried, convicted and sentenced. *Habeas corpus* proceedings were instituted, and in 1891 the question whether the United States possessed power to establish courts in a foreign land with power to try and condemn a man to death without a jury was submitted to the Supreme Court.[1]

The jurisdiction of the consular courts was upheld in a decision, very far-reaching as to the extent and scope of the treaty-making power, which was delivered by Mr. Justice Field. It was admitted that in one aspect an American accused of having committed crime in an Oriental country in which these courts are established is deprived of some of the guarantees of the Constitution. This was held to be offset in other respects as he is the gainer by not having his case tried by the local tribunal, the procedure of which is oftentimes hard and oppressive, sometimes even being accompanied with extreme

§ 452.

[1] *In re Ross*, U. S. Sup. Ct. 1891, 140 U. S. 453, FIELD, J., and see extracts from opinions in note 4 to § 390, p. 140, *ante*. The statutes and treaties are referred to at length in the extracts from Davis and Haswell's notes and, therefore, are not repeated.

cruelty and torture. The main point decided was that Congress had the right to establish these consular courts, because the legislation was based on stipulations made by a treaty, and that a sentence pronounced by one of those courts was valid, and could not be attacked on the ground that no trial by jury had been provided. This decision is one of the most far reaching in sustaining the treaty-making power, and the right of Congress to legislate in regard to American citizens, in a manner which would undoubtedly be unconstitutional in the absence of such treaty stipulations.

§ 453. **Review of chapter.**—When the author first outlined this chapter he intended to make only a brief reference to each of the six subjects referred to, for the purpose of showing to what extent the treaty-making power has been exercised. It was not then, nor has it been at any time, his intention to discuss those subjects in detail, or to collect all the authorities bearing upon them. In completing the chapter many points were naturally brought to his attention to which reference was necessary, many of them have received only a brief mention, many others have been omitted altogether. Each of these subjects could easily supply the matter for a separate volume, and the reader must understand that this chapter is essentially a series of summaries, the subjects being referred to, so far as the purpose of this book is concerned, only as they exhibit the extent of the treaty-making power of the United States.

§ 454. **No treaty ever declared unconstitutional.**—The fact which necessarily impresses itself most forcibly on the mind of any one examining the cases cited in the preceding sections of this chapter is that no treaty, or legislation based on, or enacted to carry out, any treaty stipulations has ever been declared void or unconstitutional by any court of competent jurisdiction; notwithstanding the fact that in many cases the matters affected, both as to the treaty and the legislation, are apparently beyond the domain of congressional legislation, and in some instances of Federal jurisdiction. The people of the United States, as represented in Congress and by the Judiciary, have acquiesced in the exercise of this power, and so far as all questions that have as yet arisen, or which are likely to arise in the near future, the treaty-mak-

ing power is not restricted by any limitations which can be expressly defined at the present time. The question of whether any actual limitations do exist, and if so how they can be ascertained, will be considered in the next chapter in which the author's work on the treaty-making power of the United States will be concluded.

RIGHT OF CONSULS TO ADMINISTER ESTATES OF THEIR COUNTRYMEN DYING IN THE UNITED STATES.

(Note to § 349, p. 38, and § 448, p. 333, *ante*.)

It has been held in New York that State laws relating to the administration of estates of alien decedents must give way in so far as they conflict with treaty stipulations. *In re Fattosini's Estate*, Surrogate's Court, Westchester Co., N. Y., 1900, 33 Misc. Rep. (N. Y.) 18; 67 New York Supplement, 1119; SILKMAN, Surrogate. In this case the most favored nation and other clauses in the treaties of 1871 and 1878 with Italy were construed in connection with certain clauses in the treaty of 1853 with Argentine Republic and the Surrogate held that "not only by inherent right, but by specific treaty provisions, the consul-general of Italy is entitled to administer in this case, and is preferred to the persons entitled under the State statute."

See also, *In re Tartaglio's Estate*, Surrogate's Court, Westchester Co., N. Y., 1895, 12 Misc. (N. Y.) 245; 33 N. Y. Supplement, 1121; SILKMAN, Surrogate; *Matter of Logiorato*, Surrogate's Court, New York County, 1901, 34 Misc. N. Y. 31; THOMAS, Surrogate.

CHAPTER XVI.

LIMITATIONS ON THE TREATY-MAKING POWER OF THE UNITED STATES.

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455—Power must be limited as no unlimited powers exist.

456—Degree of sovereignty retained by the people.

457—Treaty-making power and the States' Rights School.

458—Plenary power restrained only by fundamental principles on which government is based.

459—Limitations, if any, so far undefined and not judicially determined.

460—Treaties within the domain of the Political Departments of the Government; effect of their action on the Judiciary.

461—Discussion interesting, but necessarily academic; use and misuse of power.

462—Governmental checks on the treaty-making power.

463—Governmental procedure in making treaties.

464—Powers of, and checks upon, ministers plenipotentiary.

465—Necessity of ratification by the Senate; procedure in the Senate; Amendments.

466—Congressional power over operation of treaties.

467—Diversity of opinions in regard to limitations on the treaty-making power.

468—Views expressed by the Supreme Court in the *License Cases*.

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469—Views in the *Passenger Cases* of 1849.

470—Both of above opinions *obiter;* no specific treaties involved.

471—Justice Swayne's earlier views expressed at Circuit.

472—Justice Swayne's later views expressed in the Supreme Court, *Hauenstein* vs. *Lynham; the Cherokee Tobacco.*

473—Justice McLean's views in *Lattimer* vs. *Poteet.*

474—Northeastern boundary controversy; views of Daniel Webster and Chancellor Kent.

475—Professor Woolsey's views on same subject.

476—Conclusions deduced from the settlement of this controversy.

477—Argument of strict construction not applicable to Constitution.

478—*Gibbons* vs. *Ogden;* Chief Justice Marshall's views on constitutional construction.

479—Justice Story's views on constitutional construction.

480—John Randolph Tucker's views on the limitation of the treaty-making power.

SECTION
481—John C. Calhoun's views on the treaty-making power, and his forced admission of nationality of Central Government.
482—Concluding remarks.

§ 455. **Power must be limited as no unlimited powers exist.**—After perusing the foregoing chapters the reader may think he is justified in presuming that the author does not consider that there are any limitations whatever on the treaty-making power of the United State either as to the extent to, or subject-matter over, which it may be exercised.

Such, however, is not the case; the fact that the United States is a Constitutional Government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited;[1] and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the Central Government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin.[2]

§ 456. **Degree of sovereignty retained by the people.**—The provision in the Constitution that all powers not delegated to the United States by the Constitution, and not prohibited by it to the States, are reserved to the States respectively or to the people,[1] shows that, no matter to what extent sovereign powers may have been delegated to the Government, either Central or State, a certain element of sovereignty was retained by, and reserved to, the people of the United States, themselves. All sovereignty was originally vested in them, and the States and the Central Government alike derived

§ 455.

[1] *Murphy* vs. *Ramsey*, U. S. Sup. Ct. 1885, 114 U. S. 15, MATTHEWS, J., *Loan Ass'n* vs. *Topeka*, U. S. Sup. Ct. 1874, 20 Wallace, 655, MILLER, J.

[2] In this chapter the limitations on the treaty-making power will be discussed with as little repetition as possible; some of the cases already cited and some of the opinions of publicists referred to in chap. IX of vol. I are necessarily again referred to in this chapter.

§ 456.

[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Const. of the U. S., Art. X of Amendments.

The Constitution is included in full in INSULAR CASES APPENDIX, Vol. I, pp. 519, *et seq.*

whatever sovereignty they possess from them, and, therefore such residuum of sovereignty as has not yet been delegated to either State, or Central Government must necessarily still reside in the people. In this connection the ratification of the Constitution by the people, and not by legislatures of the States, is an important factor. By such ratification the people exercised their absolute ownership of complete sovereignty to transfer a portion of it from the State governments to the Central Government, and in so doing they vested certain powers in the Central Government, and at the same time expressly prohibited the States from ever exercising them. The Central Government, deriving its powers from the people, obtained them just as broadly, and with as complete power to exercise them, as the State governments obtained from the same source the right to exercise those other sovereign and plenary powers which were lodged in the State governments by the people of each State respectively.

§ 457. **Treaty-making power and the States' Rights school.**—The anti-Nationalist party has been represented in the legal forum as well as in the political arena; it has made every effort to limit the powers of the Central Government, and to extend those of the States. If, however, there are any limitations upon the treaty-making power, they do not result in extending State powers as the States are absolutely prohibited from exercising the treaty-making power in any respect whatever. The Tenth Amendment to the Constitution which has just been quoted, applies with peculiar force to the treaty-making power; under its terms, as treaty-making is prohibited to the States, all power which is not delegated by the Constitution to the Central Government in regard to the making of treaties is reserved, not to State governments, *but to the people.* In determining the extent of, and the limitations upon, the treaty-making power of the United States, so far as the power has been delegated by the Constitution,[1] it must be remembered that the power has been delegated

§ 457.

[1] These remarks apply more particularly to the limitations from the standpoint of the delegated power in regard to matters affecting States rather than of the power which the Central Government possesses as an attribute of sovereignty and nationality, and which is discussed in chapter IV of volume I.

to the Central Government in general terms, and the States have been prohibited from exercising it in any manner whatsoever. The Central Government necessarily possesses, therefore, every particle of power which can possibly be delegated in general terms to any Constitutional government, and in its absolute entirety except so far as the people have reserved any part of that power to themselves. The power can, and must, therefore, be exercised by the Central Government to its complete extent, except so far as the fundamental limitations exist which were referred to in Chapter I, as the general elementary rule applies that constitutional governments which derive their power from the people must exercise the plenary powers delegated to it in such manner that the trust reposed by the people in the government, which they have created for their own benefit and protection, is not betrayed or abused.

§ 458. **Plenary power restrained only by fundamental principles on which government is based.**—In fact the power is, and must be, plenary, that word being used in its general significance, except so far as it has been limited by the rule laid down by the Supreme Court that where plenary powers have been reposed in the Government of the United States they must be exercised in conformity with the fundamental principles of liberty which form the basis of our constitutional government.[1]

The Central Government of the United States possesses absolute power; it may, however, be restrained from improperly exercising it. Just how such restraint can be placed upon it is a problem which would be difficult to solve even if the conditions were stated. It is impossible to solve it before the occasion requiring its solution arises. A similar rule, however, would apply to the improper action of a despotic government; in speaking of the unlimited treaty-making power vested in absolute monarchs, Professor Woolsey says: "Even the most absolute despot may make treaties, which neither his subjects nor third parties ought to regard as binding. Can the house of Romanoff, for instance, resign

§ 458.

[1] See the cases on fundamental limitations collated in note to § 36, pp. 62, *et seq.*, volume I, and in INSULAR CASES APPENDIX at end of volume I.

the throne of Russia to whom it pleased? The true view here is, that the province of absolutism is not to dispose of the national life, but to maintain it without those checks on the exercise of power which exist elsewhere. No power, however uncontrolled, was given to destroy a nation or can lawfully do so."[2]

§ 459. **Limitations, if any, so far undefined and not judicially determined.**—All discussion as to the existence of limitations upon the treaty-making power of the United States must necessarily be from a purely academic standpoint. While the necessity for such discussion does not exist, every student of constitutional principles, if not every American citizen, naturally considers that limitations upon absolute power not only ought to exist, but that they ought to exist, not in the abstract but in the concrete, and be definable in express terms. If, however, any limitations do exist, they cannot be defined or expressed beyond the statement made in the preceding section that the power must be exercised in accordance with the fundamental principles of our government, and, to refer again to Professor Woolsey, for the purpose of maintaining national life and not for the purpose of destroying it.[1] Any discussion on this subject must necessarily be academic, because whatever limitations do exist have never been judicially defined, as no treaty has ever been declared void by any court of the United States. Furthermore it is still an undecided question whether the judicial department of the court has the power either to declare void a treaty made and ratified according to constitutional methods or to declare that the executive and legislative departments of the government exceeded the power vested in them by the people.

§ 460. **Treaties within the domain of the Political Departments of the Government; effect of their action on the Judiciary.**—It is indeed doubtful whether treaties can be declared void, as any change in, or abrogation of, a treaty is a matter wholly within the legislative department of the government and wholly beyond that of the judiciary. The

[2] Woolsey's International Law, § 103, p. 160, 6th Ed.

§ 459.

[1] Woolsey's International Law, § 103, p. 160, 6th Ed.

Supreme Court possesses the greatest judicial powers that have ever been vested in any court of any nation. It is not only fully conscious of the great powers which it possesses and of its right to use them, but it is extremely jealous, as it should be, of its rights and powers. One of the few declarations that this court ever made in derogation of its own supreme judicial power was that if the Supreme Court possesses the power to declare a treaty void, it will never exercise it but in a very clear case indeed.[1] That question has never been decided, because such a "clear case" never has been presented to the court as would justify the exercise of the power, if it does exist.

The Government of the United States is divided into three departments: Executive, Legislative, Judicial.[2] These departments each have their separate spheres of action; one department cannot interfere with the functions of the other, or delegate its own powers to the other.[3] The treaty-making

§ 460.

[1] *Ware* vs. *Hylton* U. S. Sup. Ct. 1796, 3 Dall. 199, see p. 237, CHASE, J.

[2] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U. S. Const. art. I, § 1.

"The executive Power shall be vested in a President of the United States of America." *Id.* art. II, § 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, § 1.

[3] *Field* vs. *Clark*, U. S. Sup. Ct. 1892, 143 U. S. 649, HARLAN, J. This case involved the validity of the Tariff Act of October 1, 1890, (26 U. S. Stat. at L. pp. 567, *et seq*); one of the points raised was that the reciprocity and certain other provisions of this act delegated legislative and treaty-making powers to the President. The court held that if such powers had been delegated the act would certainly, as to such portions, have been unconstitutional, but that the powers delegated were executive and not legislative. The syllabus says: "Congress cannot, under the Constitution, delegate its legislative power to the President," and the opinion says (p. 692):

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting

power is a function wholly within the domain of the Executive and Legislative departments, and cannot be exercised

sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the Act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and from a judgment as to whether they were reciprocally equal and reasonable, on the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea and hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molassess, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed. . . .

"'There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' [Quoting from *Locke's Appeal*, Penna. Sup. Ct. 1872, 72 Penn. St. 491, 498, AGNEW, J.]

"What has been said is equally applicable to the objection that the

by the Judicial department, which has itself declared that it possesses no legislative or treaty-making power.[4] The con-

third section of the act invests the President with treaty-making power.

"The court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President. Even if it were, it would not, by any means, follow that other parts of the act, those which directly imposed duties upon articles imported, would be inoperative. But we need not in this connection enter upon the consideration of that question."

[4] *The Amiable Isabella*, U. S. Sup. Ct. 1821, 6 Wheaton, 1, STORY, J. The XVIIth article of the treaty of 1795 with Spain provided that in case either party should be engaged in war the vessels and subjects of the other party must be furnished with sea letters or passports containing certain information; and that the form of passports was to be made out and granted according to the form annexed to this treaty. No such form was annexed to the treaty. A captured vessel had a document which the claimants insisted fulfilled the requirements, as it expressed everything that was stated in the article and which was required to be shown by the passport; the court, however, held that as no form had ever been annexed to the treaty, the whole section became inoperative and that it was beyond the power of the court to determine whether any passport was sufficient. On page 71 Justice STORY says:

"This Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law, We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It is a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the Governments. The treaty does not leave it to the *discretion* of either party to annex the form of passport; it requires it to be the *joint* act of both, and that act is to be expressed by both parties in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification."

Reference was made to the treaty of Prussia of 1785 and to the Dutch treaty of 1782 in regard to the details and annexation of sea-letters, and the court finally held that (page 76) "It cannot consider the 17th article of this treaty as complete or operative, until the form

trol of the relations of the United States[5] with foreign powers is almost entirely vested in the Executive department of

of the passport is incorporated into it by the joint act of both Governments.

"Upon the whole, it is the opinion of the Court, in which opinion six judges agree, that the form of the passport not having been annexed to the XVIIth article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize."

On the question of prize or no prize, the vessel was condemned on the facts. Mr. Justice Johnson wrote a dissenting opinion (page 81) to the effect that substantial compliance with the XVIIth article, in the absence of any form having been agreed upon and annexed, should have been deemed a sufficient compliance, and that the failure to annex a form did not nullify the article, as held by the majority of the court.

[5] CONTROL OF FOREIGN RELATIONS BY THE EXECUTIVE.

The statute prescribing the duties of the Secretary of State is as follows:

"The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President, relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or provinces, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department; and he shall conduct the business of the Department in such manner as the President shall direct." (U. S. Rev. St. sec. 202.)

For the duties devolving upon the Secretary of State, see: History of the Department of State of the United States. By William H. Michael, Chief Clerk of the Department, Government Printing Office, 1901.

Questions have frequently arisen as to how far the legislative department has any control over foreign relations; and it is a matter for the judiciary on each occasion to decide whether the point involved is legislative or executive.

It is outside the domain of this work to discuss this subject, as the treaty-making power under the Constitution requires the joint action of both the executive and the legislative departments, and therefore no question can ever arise so far as the making of treaties is concerned.

The questions which have arisen as to the division of powers between the executive and legislative branches of the Government in regard to treaties relate to the construction of treaties after they have been made, and not to the power to make them. In the INSULAR CASES APPENDIX, at the end of volume I, a number of cases are collated on this point, and they are also repeated as note 10 to this section, and other cases are also

the Government. The Legislative department, however, is joined with the executive in three particulars, to wit: making

cited in the same note. The question has frequently arisen whether or not the recognition of a foreign power, or of the belligerency of any body of people rising against a recognized government, is an executive, or a legislative act.

In the *American Law Review* for May and June, 1898, pages 390, *et seq.*, Hon. William M. Penfield, the present Solicitor of the State Department, and for whose opinion the author has a high respect, discusses the question in an article entitled, "Recognition of a New State —Is it an Executive Function?"

Judge Penfield takes the position that it is an executive, and not a legislative, act, and cites in support of his proposition a number of cases, including *Rose* vs. *Himely*, 4 Cranch, 241, p. 272; *Williams* vs. *Suffolk Insurance Co.*, 3 Sumner, 270; 13 Peters, 415, which involve the recognition of the jurisdiction of the Republic of Buenos Ayres over the Falkland Islands; *Gelston* vs. *Hoyt*, 13 Johns. Ch. 561, Kent's Chan., affirmed, 3 Wheat. 246, STORY, J.; *Jones* vs. *United States*, 137 U. S. 202, the *Navassa Islands* case; *Kennett* vs. *Chambers*, 14 How. 38, which involved the question of the recognition of the independence of Texas. He quotes the opinion of Chief Justice Taney in the case last cited as follows: "It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our Government exclusively which is charged with our foreign relations."

In speaking of the tripartite division of the Government of the United States, he says:

"The great generalization of Montesquieu that the *tripartite* division of the powers of sovereignty is the leading principle of free government, was accepted as a political axiom by the framers of the constitution; and it became the beacon light of its interpretation and construction. It was declared that the three great departments of government ought to be kept separate and distinct; that the constitution intended to maintain a marked distinction between the legislative, executive and judicial powers; that those powers must remain as apportioned; that any blending or confusion of those powers, as, for example, the association of the Senate with the President in the executive functions, such as making treaties, appointment to office, are exceptions to the fundamental rule; which exceptions were made, not to destroy, but to save the principle; and like all other exceptions to general rules, are to be taken strictly and not extended by construction. The leading principle for the construction of the constitution being *tripartite* division of powers, and the entire executive authority being vested in the President, subject to certain exceptions, which are exceptions not only out of the grant but also to the application of the truth of the maxim, all non-excepted power, including that of recognition, is in the Executive. And whatever construction tends to extend the exceptions to the operation of the maxim and to the absorption of the powers of government by

treaties in which two thirds of the Senate must concur with the President; the appointment of public ministers and am-

one department, at the expense of another, contravenes the foundation idea on which the constitution was framed, and should be rejected."

Judge Penfield's article was inspired by the fact that Senator Bacon, of Georgia, had offered a resolution that the recognition of a government was a matter "exclusively for the determination of Congress in its capacity as a law-making power."

The resolution does not appear to have been adopted.

In February and April, 1896, a concurrent resolution was adopted by both Houses of Congress as follows:

"*Resolved by the Senate (the House of Representatives concurring)*, That, in the opinion of Congress, a condition of public war exists between the Government of Spain and the Government proclaimed and for some time maintained by force of arms by the people of Cuba; and that the United States of America should maintain a strict neutrality between the contending powers, according to each all the rights of belligerents in the ports and territory of the United States.

"Resolved further, that the friendly offices of the United States should be offered by the President to the Spanish Government for the recognition of the independence of Cuba.

"Passed the Senate, February 28, 1896.

"Passed the House of Representatives, April 6, 1896."

In the case of "*The Three Friends*," 166 U. S. 1, decided by the United States Supreme Court in 1898, Mr. Chief Justice Fuller held that the recognition of belligerency was a matter for the political department, but did not consider that there had been any recognition of belligerency in Cuba, thus ignoring altogether the concurrent resolution of Congress which has just been quoted.

In other respects there are but few cases as to the control of foreign relations, it having been generally conceded, thereby rendering it unnecessary to be the subject of judicial decision, that the executive department of the United States is the one department which is charged with that branch of the conduct of our Government. In this respect see cases cited in note 9, § 460, p. 360, *post*.

See especially as to recognition of belligerency; *The Itata*, U. S. C. C. App. Ninth Circ., 1893, 56 Fed. Rep. 505, HAWLEY, J.; and *The Ambrose Light*, U. S. Dist. Ct. S. D. N. Y. 1885, 25 Fed. Rep. 408, BROWN, J. The opinion in each of these cases contains a lengthy review of legal decisions involving the powers of the executive in regard to recognition of belligerency and the control of foreign relations.

In the case last cited BROWN, J., says (p. 412): "Recognition of belligerency, or the accordance of belligerent rights to communities in revolt, belongs solely to the political and executive departments of each government. Courts cannot inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or actual revolt, exists there or not. They must follow the political and executive departments, and recognized

bassadors to foreign countries who are appointed by the President and confirmed by the Senate; and declaration of war which must be made by both Houses of Congress and affirmed by the Executive or passed over his veto. With the exception of these three functions the control of foreign relations is generally conceded to be an executive act. The courts can determine the effect of a treaty on individual rights when it operates without legislation,[6] but they cannot supply defects,[7] change words even if any apparent error has been made,[8] or determine any question of fact involved, such as location of boundaries,[9] as all those matters are within the

only what those departments recognize; and, in the absence of any recognition by them, must regard the former legal conditions as unchanged."

[6] *Foster* vs. *Neilson*, U. S. Sup. Ct. 1829, 2 Peters, 253, MARSHALL, Ch. J., and see reference to this case in § 364, pp. 66, *et seq.*, *ante*.

The La Ninfa, U. S. D. C. Alaska, 1891, 49 Fed. Rep. 575, BUGBEE, J., U. S. C. C. App. 9th Cir. 1896, 75 Fed. Rep. 513, HAWLEY, J. A vessel was arrested for the violation of a statute under which a large number of British vessels had been seized; which seizures had been referred to arbitration as to whether they were proper. *Held*, that as by the terms of the Treaty of Arbitration with Great Britain the rights of British subjects were involved; the citizens of the United States had the same right to rely upon the award as to their rights under the statute as did the subjects of Great Britain; and that the award of the arbitrators under the treaty became the supreme law of the land and was as binding upon the courts as an act of Congress. The effect of the award on the Treaty of Arbitration is referred to at pages 517–519.

Cotzhausen vs. *Nazro*, U. S. Sup. Ct. 1882, 107 U. S. 215, MILLER, J. Construction of treaty and statutes by United States custom officials as to importation of articles through the mail in connection with the Postal Treaty of Berne.

[7] *The Amiable Isabella*, U. S. Sup. Ct. 1827, 6 Wheaton, 1, STORY, J., and see extract from opinion in note 4 of this section, p. 356, *ante*.

[8] *Meigs* vs. *McClung*, U. S. Sup. Ct. 1815, 9 Cranch, 11, MARSHALL, Ch. J. In this action it was attempted to show that there was a mistake in an Indian treaty by which the word "above" was inserted instead of "below," a certain point on the river. *Held*, that the mistake could not be rectified by the court.

[9] *Pollard's Lessee* vs. *Files*, U. S. Sup. Ct. 1844, 2 Howard, 591, CATRON, J.; *Pollard's Lessee* vs. *Hagan*, U. S. Sup. Ct. 1845, 3 Howard, 212, MCKINLEY, J.; *Pollard's Lessee* vs. *Kibbe*, U. S. Sup. Ct. 1850, 14 Peters, 353, THOMPSON, J. In all of these cases it was held that where the Executive had placed a construction upon treaties of cession as to the territory they included, the courts would sustain him.

respective domains of the Legislative and Executive departments. The cases cited in the notes [10] show that the Supreme

[10] See also the cases cited in *Insular Cases* on this point as follows (repeated from INSULAR CASES APPENDIX at end of Vol. I.):

Amiable Isabella, The, U. S. Sup. Ct. 1821, 6 Wheaton, 1, STORY, J.

Castro vs. *De Uriarte*, U. S. Dist. Ct. S. D. N. Y. 1883, 16 Fed. Rep. 93, BROWN, J.

Chae Chan Ping vs. *United States* (*Chinese Exclusion Case*), U. S. Sup. Ct. 1889, 130 U. S. 581, FIELD, J.

Chew Heong vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 536, HARLAN, J.

Chouteau vs. *Eckhart*, U. S. Sup. Ct. 1844, 2 Howard, 344, CATRON, J.

Clinton Bridge, The, U. S. Cir. Ct. Iowa, 1867, 1 Woolworth, 150, MILLER, J.

Coffee vs. *Groover*, U. S. Sup. Ct. 1887, 123 U. S. 1, BRADLEY, J.

In re Cooper (*Behring Sea Cases*), U. S. Sup. Ct. 1891, 138 U. S. 404; and 1892, 143 U. S. 472, FULLER, Ch. J.

Dodge vs. *Woolsey*, U. S. Sup. Ct. 1855, 18 Howard, 331, WAYNE, J.

Field vs. *Clark*, U. S. Sup. Ct. 1892, 142 U. S. 649, HARLAN, J.

Foster vs. *Neilson*, U. S. Sup. Ct. 1829, 2 Peters, 253, MARSHALL, Ch. J.

Frelinghuysen vs. *Key*, U. S. Sup. Ct. 1884, 110 U. S. 63, WAITE, Ch. J.

Garcia vs. *Lee*, U. S. Sup. Ct. 1838, 12 Peters, 511, TANEY, Ch. J.

Georgia vs. *Stanton*, U. S. Sup. Ct. 1867, 6 Wallace, 50, NELSON, J.

Great Western Ins. Co. vs. *United States*, U. S. Sup. Ct. 1884, 112 U. S. 193, MILLER, J.

Head Money Cases, U. S. Sup. Ct. 1884, 112 U. S. 580, MILLER, J.

Holmes vs. *Jennison*, U. S. Sup. Ct. 840, 14 Peters, 540, THOMPSON, J.

Jones vs. *United States*, U. S. Sup. Ct. 1890, 137 U. S. 202, GRAY, J.

Kansas Indians, The, U. S. Ct. 1866, 5 Wallace, 737, DAVIS, J.

Kennett vs. *Chambers*, U. S. Sup. Ct. 1852, 14 Howard, 38, TANEY, Ch. J.

Luther vs. *Borden*, U. S. Sup. Ct. 1849, 7 Howard, 1, TANEY, Ch. J.

McPherson vs. *Blacker*, U. S. Sup. Ct. 1892, 146 U. S. 1, FULLER, Ch. J.

Marbury vs. *Madison*, U. S. Sup. Ct. 1803, 1 Cranch, 137, MARSHALL, Ch. J.

Miller vs. *United States*, U. S. Sup. Ct. 1870, 11 Wallace, 268, STRONG, J.

Mormon Church vs. *United States*, U. S. Sup. Ct. 1890, 136 U. S. 1, BRADLEY, J.

Morrill vs. *Jones*, U. S. Sup. Ct. 1882, 106 U. S. 466, WAITE, Ch. J.

Munn vs. *Illinois*, U. S. Sup. Ct. 1876, 94 U. S. 113, WAITE, Ch. J.

Neeley vs. *Henkel*, U. S. Sup. Ct. 1901, 180 U. S. 109, HARLAN, J.

Phillips vs. *Payne*, U. S. Sup. Ct. 1875, 92 U. S. 130, SWAYNE, J.

Pollard's Heirs vs. *Kibbe*, U. S. Sup. Ct. 1840, 14 Peters, 353, THOMPSON, J.

Pollock vs. *Farmers' L. & T. Co.* (*Income Tax Cases*), U. S. Sup. Ct. 1895, 157 U. S. 429, FULLER, Ch. J.

Rhode Island vs. *Massachusetts*, U. S. Sup. Ct. 1838, 12 Peters, 657, BALDWIN, J.

Rose vs. *Himeley*, U. S. Sup. Ct. 1808, 4 Cranch, 241, MARSHALL, Ch. J.

Taylor vs. *Morton*, U. S. Cir. Ct. Mass. 1855, 2 Curtis, 454, CURTIS,

Court has always left the Executive and Legislative departments free to act, practically without limitation, in regard to the matters which are wholly within their respective spheres.

Furthermore the limitations, if any, can never be defined until a treaty has actually been declared void; because the Supreme Court has always adhered to the rule that no opinion in constitutional controversies can be inferentially extended beyond the points directly involved and expressly determined.[11] So long, therefore, as treaties are declared valid, any reference of any kind, or any opinion expressed as to

J., (aff'd U. S. Sup. Ct. 1862, 2 Black, 481, CLIFFORD, J.).

United States vs. *Holliday*, U. S. Sup. Ct. 1865, 3 Wallace, 407, MILLER, J.

United States vs. *Johnston*, U. S. Sup Ct. 1888, 124 U. S. 236, HARLAN, J.

United States vs. *Palmer*, U. S. Sup. Ct. 1818, 3 Wheaton, 610, MARSHALL, Ch. J.

United States vs. *Rauscher*, U. S. Sup. Ct. 1886, 119 U. S. 407, MILLER, J.

United States vs. *Reynes*, U. S. Sup. Ct. 1850, 9 Howard, 127 (cited as 50 U. S.), DANIEL, J.

United States vs. *Yorba*, U. S. Sup. Ct. 1863, 1 Wallace, 412, FIELD, J.

Whitney vs. *Roberston*, U. S. Sup. Ct. 1888, 124 U. S. 190, FIELD, J.

Whiton vs. *Albany County Ins. Co.*, Sup. Ct. Mass. 1871, 109 Mass. 24, GRAY, J.

Williams vs. *Suffolk Ins. Co.*, U. S. Sup. Ct. 1839, 13 Peters, 415, MCLEAN, J.

Other cases bearing on this point are cited in note 5 to this section, see pp. 357, *et seq.*, *ante*; see also *The Peggy*, U. S. Sup. Ct. 1801, 1 Cranch, 103, MARSHALL, Ch. J. See 3 Atty Gen'l Opinion (Felix Grundy) p. 371, advising the Secretary of War that the President could make payments under a treaty and disregard any writs of injunction which the judiciary might allow.

[11] *Cheong Ah Moy* vs. *United States*, U. S. Sup. Ct. 1885, 113 U. S. 216, MILLER, J. This was a case arising under the Chinese exclusion and deportation acts; before the case reached the Supreme Court the mandate had been completely carried out, and the court refused to entertain the case.

After reciting the condition of matters involved and holding it to be a moot question, the court said at the close of a brief opinion, (p. 218):

"The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail, it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal or in prison.

"This court does not sit here to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce."

See also *United States* vs. *Weld*, U. S. Sup. Ct. 1888, 127 U. S. 51 (p. 57), LAMAR, J., in which the court refused to determine generally the jurisdiction of the Court of Claims.

other, or supposed, conditions under which the treaty might have been declared invalid would be merely speculative, purely *obiter*, and not binding upon the conscience of the court whenever such conditions should come before the court in fact and not in theory.

It has also been held that although the Judicial department has no treaty-making or legislative power, it is the peculiar province of that department to *construe* treaties and statutes.[12]

§ 461. **Discussion interesting, but necessarily academic; use and misuse of power.**—Discussion in regard to the extent of the treaty-making power, and as to whether or not the United States Government may not at some time exceed its power, may be very interesting, but it is practically of little value. The question is not likely to arise, as, in the natural course of events, it is hardly possible, for two reasons, that any treaty will be made which the Supreme Court would be justified in declaring void: first, because the mere possession of power does not necessarily imply its misuse,[1] and the executive department of this government, as a general rule, acts in accordance with American policy and American principles; secondly, because the governmental checks upon the exercise of the power, and upon the carrying out of treaty stipulations practically prevent such misuse.

The people of the United States control the executive and legislative departments of the Government. They can change the Executive every four years, the lower House of Congress every two years, and the entire Congress every

[12] *Ogden* vs. *Blackledge*, U. S. Sup. Ct. 1884, 2 Cranch, 272, CUSHING, J. In a foot-note to the fourteenth edition of Kent's Commentaries, page 350 (*287), the following occurs:

"But Congress has no power, it is said, to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. *Wilson* vs. *Wall*, 6 Wall. 83, 89. On the other hand, the courts of the United States cannot question the power of the other party to a treaty to do certain acts when he has been treated as having the power by the President and Senate. *Doe* vs. *Braden*, 16 How. 635; *Fellows* vs. *Blacksmith*, 19 How. 366; see p. 330, n. 1."

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[1] Story's Commentaries on the Constitution, vol. I, § 425, p. 324, 5th ed., see also extract in text of § 479, *post*; see also *Anderson* vs. *Dunn*, U. S. Sup. Ct. 1821, 6 Wheat. 204 p. 226, JOHNSON, J., cited by Story.

four years, or at the outside every six years. The people, therefore, always have it in their power, by forcing a change of executive administration, or of congressional majority, or both, to punish the improper exercise and misuse of power in the past, and to prevent it in the future. The residuum of power in the people of the United States, while it is an undefined quantity, is still the most powerful factor in the government of this country. It is the one power that is superior to all the departments of the government, separately and combined. If it cannot be exactly defined and located, it can be, and on many occasions has been, felt by every department of the government, executive, legislative, and judicial. In fact, the residuum of power reserved to the people by the Tenth Amendment to the Constitution is what is known in this country as public opinion,[2] and as such it is respected by all worthy public officers, and feared by all who are unworthy.

§ 462. **Governmental checks on the treaty-making power.** —Another check upon the improper exercise of the treaty-making power is the procedure involved in the negotiation

[2] In speaking of the sovereignty of the people as manifested by opinion, Bliss in his treatise on Sovereignty (Of Sovereignty, by Philemon Bliss, LL. D., Boston, 1885), says (p. 57): "Sovereignty manifests itself, according to Mr. Lieber, (1) by public opinion; (2) by generation of law; and (3) by power. Without these there is no sovereignty.

"Public opinion is 'the sense and sentiment of the community, necessarily irresistible, showing its sovereign power everywhere. It is this public opinion which gives sense to the letter and life to the law; without it the written law is a mere husk.' In further considering its power, he says:

"'Public opinion is not only an opinion pronounced upon some subject, but it is likewise that which daily and hourly interprets laws,—carries them along or stops their operation,—which makes it possible to have any written laws, and without which any the wisest law might be made to mean nonsense. . . . It is that mighty power which abrogates the most positive laws, and gives vast extent to the apparently narrow limits of others; according to which a monarch, ever so absolute in theory, cannot do a thousand things; which renders innocent what was most obnoxious, and at times makes useless the best intended measures, protecting sometimes even crime.'

"I have spoken of the limitation upon sovereignty created by opinion; and in any description of constitutional restraints, this power assumes a commanding importance."

of treaties and their ratification, and also in the enactment of legislation to carry them into effect. No treaty can, to use well understood expressions, be "railroaded," or "rushed" through the various stages necessary for its complete consummation. If there is anything wrong about it, ample opportunities are afforded for time, reflection and deliberate action, before it becomes the supreme law of the land.

The Constitution provides that the President shall make treaties by and with the consent of the Senate.[1] This was construed by some, in the earlier days of our Government, as meaning that the advice of the Senate should be taken by the Executive before the treaty was negotiated; the consent to be given after it had been made. The impossibility, however, of obtaining an expression of opinion in advance of the negotiation of the treaty has caused that plan to be abandoned. Treaties are now concluded either by the Secretary of State, who acts for the Executive in regard to all foreign relations, or through commissioners appointed by, and representing, the President, but generally receiving their

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[1] United States Constitution, article I, sec. 10, paragraph 1: "No State shall enter into any Treaty, Alliance or Confederation."

Article II, sec. 2, paragraph 2: "He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

Article II, sec. 3: ". . . he (the President) shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

Article III, sec. 2, paragraph 1: "The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls."

Article VI, paragraph 2: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

instructions through the State Department. Commissioners are sometimes appointed by the President and confirmed by the Senate, and sometimes are appointed and act without such confirmation.

In these negotiations, while there is no obligation to consult the Senate, that body has frequently been taken into the confidence of the Executive prior to the conclusion of the treaty. This is done sometimes by the appointment of senators as commissioners;[2] at other times the Committee on Foreign Relations, to which the treaty when completed is always immediately referred after it has been transmitted to the Senate, is consulted through its chairman[3] or through the members in sympathy with the administration.[4] The opinions of members of this Committee are undoubtedly of aid and assistance to the President, or to his representatives, in foreshadowing what the action of that Committee will be when the treaty shall come before it for consideration.

§ 463. **Governmental procedure in making treaties.**— While the provisions of the Constitution, therefore, are strictly adhered to, and the President makes the treaty, the State department always, and the Senate generally, is fully apprised of the subject-matter of the negotiations and the method in which it is proposed to deal with it, before any treaty is concluded, and before the faith of the nation is even

[2] During the past few years the propriety of appointing Senators to act as commissioners to negotiate treaties has been discussed in Congress on several occasions. It has been suggested that Senators should not act in such capacity as they are eventually to pass upon the treaty itself; it has been urged, on the other hand, that it is advisable to have Senators act as such commissioners so that all the circumstances surrounding the negotiation can be reported by them to the Senate, and thus fully acquaint that body with all the details involved.

[3] A notable instance in this respect was when Secretary Seward submitted the Russian treaty of 1865, ceding Alaska, to Senator Charles Sumner, then chairman of the Committee on Foreign Relations.

In the recent negotiations of several treaties, notably those in relation to reciprocity, and with Great Britain in regard to the control of trans-isthmian communication, members of the Foreign Relations Committee have been consulted by the Administration.

[4] See documents recently published of Compilation of Reports of this Committee referred to in note 9 to § 444, p. 312, *ante*.

tentatively pledged by the signatures of the plenipotentiaries. Opportunities are thus afforded of investigating whether the power of the Government is being properly exercised, not only as to material advantage, but also as to the legality of the proceedings and the extent of the power exercised.

After the treaty has been concluded it is referred to the President; it then rests with him to determine whether he shall submit it to the Senate for ratification. This is not merely a matter of form; there are numerous instances in the history of the United States in which treaties have been concluded by commissioners appointed by the President but which he, or his successor, has rejected and which have never reached the Senate,[1] the mere action of the President in refusing to submit them, thus rendering them wholly inoperative.

In a note to this section[2] a brief description will be given

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[1] President Taylor refused to transmit a treaty negotiated with Nicaragua in 1849. (Hise-Silva Treaty.) See for particulars of this treaty and events connected therewith, letter of Secretary Evarts to President Hayes, March 8, 1880, published with Sen. Ex. Doc. 112, 46th Cong., 2d Session.

[2] FORMS OF AGREEMENTS WITH FOREIGN POWERS.

Five methods will be referred to in this note in the following order: I. Treaties and Conventions; II. Declarations of Accession to Existing Treaties; III. *Modi Vivendi;* IV. Protocols and Diplomatic Arrangements; V. Reciprocal Legislation and Executive Proclamation.

I. TREATIES AND CONVENTIONS.

The method usually, in fact almost universally, adopted for establishing relations between two or more countries is by the execution and formal ratification, according to the constitutional provisions or law of the contracting parties, of a written instrument containing: First, the names of the contracting powers, or sovereigns, and the individuals with their full titles, who have been authorized to negotiate the treaty, with a declaration that the representatives of each power have examined and approved the full powers of the representatives of the other power and found them satisfactory; Second, one or more articles declaratory of the various matters agreed upon by the powers and which are either expressed in the common language, if both countries have the same, or in the several languages of the contracting powers, in either parallel columns or duplicates, or in either English or French, as may have been agreed upon, especially in the case of conventions acceded to by numerous powers; when a treaty is in one or more languages each must be treated as the final treaty; (See Davis' Rule VI on construction of treaties in note 6 to § 391, p. 147, *ante*); Third, provisions for ratification of

of the various methods by which contractual relations between the United States and Foreign Powers are established

the treaty, the exchange of ratification, duration and method of termination or renewal; Fourth, signatures of the commissioners.

The foregoing are simply stated here as the customary forms usually complied with; the form of a treaty or convention, if properly ratified and acted upon, is not essential to its validity. The procedure generally followed by the United States in the negotiation and ratification of a treaty is the subject of other notes (see § 464, 465, pp. 373, *et seq.*, *post*).

Agreements or contracts between Governments are called TREATIES and CONVENTIONS indiscriminately. While no fixed rule can be stated as to the distinction between these terms, it can be said generally that TREATY applies to an international agreement between two nations by which their relations of peace, amity and commerce are established, while the word CONVENTION applies to agreements between a number of powers, or between two powers as to some particular matter, such as in the former case, the Geneva Conventions (Red Cross) of 1864 and 1882, and in the latter case the numerous "claims conventions" between this and other countries settling claims or appointing commissions to adjudicate them. Postal agreements are almost universally called POSTAL CONVENTIONS. The titles of the various treaties, conventions, etc., in the TREATIES APPENDIX at the end of this volume show how these terms are generally used. Treaties, conventions (postal and all other kinds), and in fact every kind of an agreement with any foreign power or powers which can come within the definition of the word TREATY as the same is used in the Constitution of the United States, must be ratified by the Senate, by a two-thirds vote, before they can become the law of the land as provided by Article VI, and in this respect it makes no difference how it may be entitled. This applies to declarations of accession, *modi vivendi*, and, to some extent, to protocols and agreements mentioned in the succeeding sections.

For a definition and description of "treaties" and other international arrangements, and how they are enacted into, see the following authorities: Glenn's International Law, §§ 100-103; Woolsey's International Law, § 150; Wharton's International Law Digest, §§ 130, 131, and 131*a*; Hall's International Law, 4th edition, pp. 343, *et seq.*; Wheaton's International Law, 8th edition, pp. 328, *et seq.*

II. DECLARATIONS OF ACCESSION TO EXISTING TREATIES.

Treaties and conventions are sometimes made by two or more powers, with provisions permitting other governments to unite therein with the same effect as though they were among the original signatory powers. This is called *accession* to a treaty and is evidenced by a declaration of accession, executed in the manner provided by, and lodged with, the power named in the treaty.

The Geneva Convention (Red Cross) of 1864 was acceded to by the United States by a declaration executed March 1, 1882, (U. S. Tr. and

and evidenced. No attempt will be made to enumerate every instance in which the various methods have been

Con. 1889, p. 1150; U. S. Treaties in Force, 1899, p. 665) which was ratified by the Senate March 16, 1882, and accepted by the Swiss Confederation June 9, 1882.

There have been occasions on which foreign powers have acceded to treaties previously made by the United States with a single power and containing provisions for accession of other powers. Such was the case when Württenburg acceded in 1853 by a declaration (U. S. Tr. and Con., 1889, p. 1146) to the treaty of 1852 between this country and Prussia, which provided for the accession thereto of other States of the then existing Germanic Confederation. In 1847 Oldenburg acceded to the treaty of commerce and navigation with Hanover, by a mere declaration of accession, which was never ratified or proclaimed (9 U. S. Stat. at L., Treaties, p. 66).

A notable instance, which can only be briefly mentioned, in which the accession of the United States to an existing treaty was considered, arose under the Declaration of Paris of 1854, as to Privateering, Blockades and Neutral Commerce. Only four powers originally entered into this Declaration, but it contained, provisions for other Powers acceding thereto and nearly all the maritime powers have done so. The correspondence conducted in regard thereto, during their respective terms of office, by Secretaries of State Marcy and Seward, is interesting and instructive. The United States has never acceded to the Declaration; but on several occasions it has offered to do so under certain specified conditions generally involving the exemption of private property at sea from capture during war. (See document prepared by the author on this subject for use of the American Commissioners to the Peace Conference at The Hague, 1899, referred to in note 5 to § 160, pp. 278, 280, vol. I.)

In the author's opinion the ratification of the Senate is as essential to the accession of the United States to an existing treaty or convention as it would be if the United States were one of the original parties thereto; and to the accession of a foreign power to an existing treaty or convention between the United States and another foreign power, unless the original treaty provided for such accession.

III. MODI VIVENDI.

A *modus vivendi* is an agreement between two or more nations as to their conduct in regard to matters in dispute pending the adjustment thereof. That is to say it is a temporary treaty or convention limited to a period which as a general rule is very brief.

Instances in which this form of treaty has been used are:

In regard to the North Atlantic Fisheries in 1885, when the fishery clauses in the treaty of Washington of 1871 were terminated (see note 1 to § 385, p. 132, *ante*), a *modus vivendi* was arranged by notes exchanged during April, 1885, between Secretary Bayard and Sir L. S. Sackville-West, then minister from Great Britain, by which certain arrangements were made for the balance of the fishing season from July 1, 1886, when

adopted. In each case a few examples will be given. The various treaty volumes already referred to, and the appen-

the treaty terminated, to December 31, 1886. (See U. S. For. Rel. 1885, pp. 460, *et seq.*)

A second *modus vivendi* was entered into in regard to the North Atlantic Fisheries in 1888. This was arranged by the Commissioners who framed the Bayard-Chamberlain treaty of 1888 which was rejected by the Senate. (See Sen. Ex. Doc. 113, 50th Cong., 1st Sess,, March 5, 1888, pp. 125 and 141.) It granted certain privileges to American fishermen as to purchasing bait and other supplies on payment of a fixed license. It expired by its own limitation February 15, 1890, and has never been renewed, although in 1898 the Dominion government was still issuing licenses under it.

Neither of these *modi* appear to have been ratified by the Senate. They were simply protocols of the class which will be referred to in the next subdivision of this note.

A *modus* in regard to the protection of fur seals in Bering Sea was entered into between this country and Great Britain in June, 1891. This *modus* was never ratified by the Senate but was proclaimed by the President. (27 U. S. Stat. at L., p. 980.) The protection of the seals during the pendency of the arbitration in Paris on the subject was covered by a formally ratified convention. (27 U. S. Stat. at L. p. 952).

A *modus* was also entered into between the United States and Russia in regard to fur seals in 1894 (28 U. S. Stat. at L. p. 1202; U. S. Treaties in Force, 1899, p. 545) which was ratified by the Senate.

IV. PROTOCOLS AND DIPLOMATIC AGREEMENTS.

There have, however, been occasions when international matters have been adjusted without the usual formalities attendant upon the negotiation of treaties, and without ratification of the Senate. One method is by protocol between the foreign offices of the two countries.

The definition of protocol includes a record of the proceedings of commissioners, and in that sense it is not used to designate a completed agreement (for an instance in this sense, see proceedings of the commissioners negotiating the Treaty of Washington of 1871 with Great Britain, U. S. Foreign Relations, 1871, pp. 495, *et seq*).

When, however, the foreign offices of two countries agree in a matter and reduce it to writing it is often called a protocol. It is not, so far as the United States is concerned, a treaty, and does not become the supreme law of the land. How far it is binding upon the national conscience is therefore a political and not a legal question. The extent to which foreign relations can be settled in this manner is one which has not been, and cannot be, generally stated.

Such protocols and agreement when first made are binding in a moral sense upon the Executive department of the administration making them; they are not laws nor are they contracts which the legislatures of either party are bound to render effectual by legislation, until after they have assumed legal form by ratification. It is doubtful if they are binding even morally upon any administration other than that which

dices and the digests thereto must be consulted in order to find all the cases of each class, and the list of treaties in the

entered into them. See *Angerica* vs. *Bayard*, U. S. Sup. Ct. 1887, 127 U. S. 251, BLATCHFORD, J., and extract therefrom in note 8 to § 444, p. 305, *ante*, in which the Supreme Court held that a letter of Secretary of State Evarts allowing interest on money received from Mexico, was not binding on his successors.

Some of the instances in which instruments in writing have been exchanged by the Secretary of State with the representatives of foreign countries, and acted upon thereafter as agreements between the United States and the said countries respectively, are:

The Armistice between the United States and Great Britain pending the negotiation of the Preliminary Articles and Definite Treaty of Peace terminating the Revolutionary war. (8 U. S. Stat. at L., p. 58.)

The Protocol of 1898 providing for the appointment of a Commission to negotiate the Treaty of Peace terminating the Spanish-American war of 1898. (Printed in full in INSULAR CASES APPENDIX at end of volume I.)

The two *Modi Vivendi* as to North Atlantic Fisheries, referred to in the preceding subdivision of this note.

The agreement of April, 1817, between the United States and Great Britain as to the naval force to be maintained by those governments upon the American lakes. (8 U. S. Stat. at L., p. 231.) The two governments observed the terms of this agreement, in that form, for about a year when it was approved by the Senate, and proclaimed by the President on April 28, 1818. (11 U. S. Stat. at L., p. 766.) For a history of this agreement, see Johns Hopkins University Studies in Historical and Political Science, Series XVI, No. 4, pp. 59, *et seq.*, Baltimore, 1898.

There have also been occasions on which claims of citizens of the United States and of foreign governments have been referred to arbitration by protocol, although a formal convention ratified by the Senate is the usual method. (As to The Hague treaties and the necessity for a convention or the sufficiency of a protocol for referring claims to the Tribunal, see note 1 under § 465, p. 376, *post.*)

The claims of American citizens against Spain for wrongs and injuries committed by the authorities of Spain and Cuba were referred to a commission which sat for several years in Washington, by an agreement evidenced only by an exchange of notes between Major General Daniel E. Sickles, our then Minister to Spain, and the Spanish Secretary of State. This agreement was never ratified by the Senate. (See U. S. Tr. and Con. 1889, p. 1025.) Many awards were made thereunder and paid by Spain. Had the awards been made *against* the United States some question might have been raised as to their validity on account of the non-ratification by the Senate. Spain does not seem to have raised any question in regard thereto.

Some other unratified protocols or agreements, by which the claims of citizens of the United States were submitted to arbitration are: The protocol of 1870 with Brazil (Moore's History of International Arbitration, p. 4687); the protocols of 1884 (23 U. S. Stat. at L., p. 785), of

Treaties Appendix at the end of this volume will also be found of some use in this respect.

1885 (U. S. For. Rel., 1885, p. 500), and of 1888, with Haiti (Moore's History of International Arbitration p. 4770); and the agreement of 1885 with Spain (U. S. For. Rel. 1885, p. 683).

On one occasion at least the United states has acquired territory by protocol only. Horse Shoe Reef in Lake Erie was transferred to this government by a protocol and statement, and no formal treaty was ever made. (See U. S. Tr. and Con. 1889, p. 444.) Protocols have also been made on the signature or exchange of a treaty, to determine the exact meaning of a clause therein contained; as on the signature of the treaty between Bavaria and the United States, May 26, 1868. (See U. S. Tr. and Con. 1889, p. 50.) The extent to which a protocol of this nature, when made after ratification by the Senate, can affect the treaty itself is one of the numerous questions connected with the Clayton-Bulwer treaty of 1850 with Great Britain. (See U. S. Senate Document 194, 47th Congress, 1st Sess. pp. 82–87, and report of same with other documents, 1885, p. 235.)

V. RECIPROCAL LEGISLATION AND EXECUTIVE PROCLAMATION.

Another method by which relations with foreign governments can be arranged and one that has often been resorted to is reciprocal legislation. That is each country enacts similar laws affording to citizens of the other reciprocal rights, or certain matters are arranged by the legislature of one country adopting a certain statute and the legislature of the other country accepting the provisions therein contained.

There have been two instances of annexation by reciprocal legislation. Texas was annexed as a State, and the Hawaii Islands as a territory, of the United States, by the Congress of the United States adopting joint resolutions specifying the terms on which the annexation could be made, and the legislatures of the other country accepting the terms. In neither of these instances was there any danger of the legislation of the other country being repealed, as in both cases the annexed government ceased to exist as an independent power and therefore no legislature with national power existed which could pass a repealing law.

Reciprocal legislation has been resorted to in regard to commercial relations, reciprocity in tariff rates, protection of copyright and like matters. A few instances only will be cited.

Tonnage dues are generally regulated by allowing to foreign vessels the same rates as American vessels when the country whose flag they fly accord to American vessels the same immunities. This is pursuant to acts of Congress and is generally evidenced by a proclamation of the President.

Under the Tariff Act of 1890 (26 U. S. Stat. at L., p. 567; see p. 612), the President was empowered to remit certain duties on goods brought from such foreign countries as accorded certain specified privileges to American goods. The constitutionality of this act was attacked on the ground that it delegated treaty-making power to the President, but the Supreme

§ 464. **Powers of, and checks upon, ministers plenipotentiary.**—The faith and honor of the nation are not affected by the refusal of the Senate to ratify a treaty negotiated by commissioners representing the United States, as all commissions of plenipotentiaries appointed for that purpose contain provisions that their action is subject to the approval of the President, and to ratification by the Senate.[1] Plenipotenti-

Court sustained the validity of this method of regulating foreign relations; *Field* vs. *Clark*, U. S. Sup. Ct. 1892, 143 U. S. 649, HARLAN, J.; CHIEF JUSTICE FULLER wrote a dissenting opinion. When the tariff act of 1890 was repealed these reciprocal provisions under the proclamations necessarily ceased and the duties under the new tariff law were exacted alike from all countries.

Under the reciprocity provisions of the tariff act of July 24, 1897, (30 U. S. Stat. at L., p. 151, see sec. 3, p. 203,) the President, in July, 1900, by two proclamations, granted reduced duties on certain articles to Germany and Italy respectively. (31 U. S. Stat. at L., pp. 1978 and 1979.)

Under the Copyright Laws of 1891 and Rev. St. U. S. §§ 4952, *et seq.*, as thereby amended, protection is afforded to foreign authors whose countries afford similar protection to American authors. It is an executive act to determine when these provisions are complied with and the Executive announces the fact by proclamation. See Bulletin No. 4, issued by the Copyright Department of the Library of Congress for a list of countries which have afforded this protection to Americans, and whose citizens are allowed to copyright their works in the United States.

See For. Rel. U. S. 1879, pp. 481, *et seq.* for correspondence of Secretary of State, Wm. M. Evarts, on the subject of reciprocal legislation in regard to wreckage and salvage in the Great Lakes.

The danger of reciprocal legislation is that either country can repeal or modify its own legislation and deprive citizens of the other country of the protection formerly afforded. This necessarily is met by counter legislation or by Executive proclamation.

As stated at the outset of this note only a few instances are given of each of the methods referred to in this note.

§ 464.

[1]The Commissions and Full Powers of the American plenipotentiaries to negotiate the Treaty of 1898 with Spain appear at pp. 15, *et seq.*, of Senate Document, No. 62 (Part 1), 55th Congress, 3d Session, Message from the President of the United States transmitting the treaty. The plenipotentiaries were appointed "to negotiate and sign a Treaty of peace between the United States and Spain, subject to the ratification of their Government."

The Full Power of the Spanish Commission was broader and contained the following: "And everything you may so confer and agree upon, negotiate, conclude and sign, I now confirm and ratify, I will observe and execute, will cause to be observed and executed, the same as if I myself had conferred and agreed upon, negotiated, concluded and signed it, for all of

aries of foreign governments dealing with the United States are always fully aware of the existence of those limitations, as the examination and exchange of the commissions, or "full powers" as they are called in diplomatic terms, of the plenipotentiary, always precede any negotiation whatsoever.[2] It is also a principle of international law that the ministers of one government are bound to know the constitutional limitations on the power of the ministers of another government with whom they may be dealing.[3] This rule applies with peculiar force to the negotiation and ratification of treaties with governments which exist under a written constitution, as all

which I confer upon you ample authority to the fullest extent required by law. . . . In witness, etc.

"Signed: MARÍA CHRISTINA."

The Full Powers of the American and British Commissions to negotiate the Treaty of Washington of 1871 appear at pp. 495, *et seq.*, For. Rel. U. S. for 1871. They do not contain any words of limitation as to ratification.

As a general rule the treaties themselves contain a provision that the ratification of the President and Senate is essential to their validity.

[2] The first clause of nearly every treaty in the Treaty Volumes show that this form of procedure is adopted.

[3] "The municipal constitution of every particular State determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential, to enable the chief executive magistrate to pledge the national faith in this form. In all these cases, it is, consequently, an implied condition in negotiating with foreign powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the state.

"'He who contracts with another,' says Ulpian, 'knows, or ought to know, his condition.' *Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus* (l. 19, D. de div. R. J. 50, 17). But, in practice, the full powers given by the government of the United States to their plenipotentiaries always expressly reserve the ratification of the treaties concluded by them, by the President, with the advice and consent of the Senate." Wheaton's Elements of International Law, § 265, page 366, Boyd's Third English Edition.

See also § 131, vol. II, pp. 5 *et seq.*, Wharton's Digest of International Law.

constitutional limitations are necessarily a matter of public knowledge. The same rule applies to the negotiation of treaties by Great Britain and other powers.[4]

§ 465. **Necessity of ratification by the Senate; procedure in the Senate; amendments.**—Assuming that the treaty is satisfactory to the President, and he transmits it to the Sen-

[4] The same procedure is largely in force in England. "For the purpose of making a treaty, the first stage in the proceedings is the grant of powers to representatives of the Crown to negotiate and conclude the treaty. For this purpose an instrument is prepared containing a full power to the Minister representing the Crown to negotiate or conclude a treaty, or convention with the Minister who is invested with similar powers to act for the State, which is the other party to the transaction. To this instrument the Great Seal is affixed on the authority of a sign manual warrant countersigned by the Secretary of State for Foreign Affairs.

"When a treaty is concluded it is signed and sealed in duplicate by the Ministers representing their respective countries with their own seals. If the treaty contains, as is usual, a clause providing that it shall be ratified and ratifications exchanged at some future date and specified place, then until ratification neither side is bound by it. If there is no such clause, the treaty may take effect in accordance with the terms therein contained. The power to ratify or reject is vested in different parts of the Sovereign power, according to the constitution of different countries, in a popular assembly, as the Cortes in Portugal; in a second chamber, as the Senate in the United States; in the Executive, as the Crown in England.

"And so a warrant is again issued under the sign manual, countersigned by the Secretary of State, for affixing the Great Seal to an instrument ratifying the treaty. The instrument of ratification which is in fact the treaty with the Great Seal affixed to it, is then exchanged, by the Minister empowered to do so, for a ratification with corresponding forms from the other side. The Ministers who exchange ratifications execute at the same time in duplicate a document of a less formal but very important character, a statement, sealed with their respective seals, that the ratifications have been exchanged. The document of ratification of the treaty by the foreign power with whom we are dealing, and the document attesting the fact that ratifications have been exchanged, are then deposited in the Foreign Office.

"It is possible that a treaty may require legislation in order to bring it into effect. Such is the case with treaties involving fiscal changes which cannot be brought about without the consent of Parliament. The ratification is then postponed till the required legislation has taken place, or the treaty must contain, express or implied, a condition subsequent that its operation is dependent on the action of Parliament." Anson's Law and Custom of the Constitution, Part II; The Crown, 2d edition, pp. 48–49.

ate, it must receive a two-thirds vote of that body before it is ratified; and there must be an exchange of ratifications with the other power, before the treaty finally becomes the supreme law of the land.[1] In the Senate it has to pass through

§ 465.

[1] THE HAGUE TREATIES OF 1899.

To what extent this ratification is necessary and whether it can be dispensed with in regard to any arrangements with foreign powers has to some extent been discussed in note 2 to § 463, pp. 367, *et seq. ante.*

On July 29, 1899, several conventions were concluded at The Hague by the representatives of powers who had been in attendance on the Peace Conference in that city. One of these was a "convention for the peaceful adjustment of international differences," consisting of sixty-one articles providing for international commissions of inquiry, and for international arbitration. By Art. XX the signatory powers undertook to "organize a permanent court of arbitration accessible at all times, and acting, unless otherwise stipulated by the parties in accordance with the rules of procedure included in the present convention." Arts. XXIII and XXIV provide for the appointment of not more than four persons by each Power to act as arbitrators.

President McKinley appointed Benjamin Harrison, formerly President of the United States (now deceased and succeeded by Hon. Oscar S. Straus); Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States; Hon. George Gray, Delaware, formerly Senator of the United States and now United States Circuit Judge; and Hon. John W. Griggs, formerly Attorney General of the United States. Article XXXI is as follows: "The powers which resort to arbitration shall sign a special act (*compromis*), in which the subject of the difference shall be precisely defined, as well as the extent of the powers of the arbitrators. This act implies an agreement by each party to submit in good faith to the award."

Then follow a number of articles establishing the rules and procedure to be followed by the parties to arbitrations before the court.

For this, and other treaties concluded at The Hague Conference, see The Peace Conference at The Hague, by F. W. Holls, pp. 374 *et seq.*

Up to the present time no disputed question has been referred to The Hague Court of Arbitration, by the United States. The question, however, has been discussed from an academic standpoint, whether the Executive department of the United States can refer a matter in dispute to this court by protocol or agreement without senatorial action thereon, or whether a formal agreement or treaty to arbitrate must be made and ratified by the Senate similar to those with Great Britain of 1871, as to the "Civil War" and "Alabama" Claims, (U. S. Tr. and Con. 1889, p. 478, and U. S. Treaties in Force, 1899, p. 252), and of 1892 as to the Bering Sea dispute, both of which were ratified by the Senate. (U. S. Treaties in Force, 1899, p. 262.)

the ordeal of an examination by the Committee on Foreign Relations; this Committee has always been composed of representatives of both of the leading political parties, the dominant one having the majority in the Committee as well as in the Senate. The legal questions involved in our relations with foreign powers are of such importance that proficiency in constitutional and international law has become a *sine qua non* for membership in that Committee, the list of whose members during the past century would include the names of many of the ablest jurists of the United States, whose reputations are not confined to this side of the Atlantic.[2]

If the majority of the Committee on Foreign Relations

The views of Mr. Holls as to the necessity for the consent of the Senate to submit matters to this tribunal for arbitration, as expressed on p. 216 of his Peace Conference at The Hague, after referring to Art. X of the treaty which provides for appointments of Commissions of Inquiry are as follows:

"This point is of essential importance in the United States of America on account of the power of the Senate. The appointment of a Commismission of Inquiry having no further necessary consequences than the providing for each party's share of necessary expenses, would seem to be within the ordinary diplomatic functions of the President and Department of State, by memorandum or protocol whereas an agreement to submit any question to a court of arbitration, the decision to be binding upon the parties, must necessarily take the form of a treaty requiring the constitutional coöperation of the Senate."

The Hague treaties were ratified Feb. 7th, 1900; have not been officially reported but will probably appear in 32 U. S. Stat. at Large.

[2] The Senate Document No. 231, already referred to (note 9, § 444 p. 312, *ante*) is a compilation of reports from this committee since 1789. Amongst some of the members whose names are mentioned as the authors of reports, are Charles Sumner, John W. Clayton, Frederick T. Frelinghuysen, John T. Morgan, William Windom, George H. Pendleton, George F. Edmunds, Cushman K. Davis, Henry Cabot Lodge, George Gray, William H. Seward, William M. Evarts, James Buchanan, Henry Clay, Edward Everett, John Sherman, Daniel Webster, Lewis Cass, and many others. Some of the reports have become famous as containing expositions of principles of international law recognized by the United States. Amongst these is the report of Senator Sumner on the duty of Congress to pay our citizens for their claims known as the French spoliation claims, which were satisfied as against France by the treaties of 1800 and 1803. (See p. 274, Part I, Sen. Doc. 231, cited *supra*.)

In the Letters of Historicus in *The London Times*, originally published under an assumed name, but now credited to Sir William Vernon

reports the treaty favorably, it is still necessary for its advocates to obtain a two-thirds majority of the Senate in order to ratify it, and all questions relating to it are fully open for discussion.[3] The consideration of treaties is sometimes con-

Harcourt, a striking tribute is paid to the authority which should be given to American decisions on the subject of international law. On page xii of the preface, after a beautiful tribute to Washington and a reference to the closing chapters of Marshall's Biography, he says: "I have spoken with the respect they deserve of the judicial records of American decisions. But an equal if not higher reputation belongs to the archives of American diplomatic statesmanship at the close of the last and the beginning of the present century. The published volumes of American State Papers during the early years of the French Revolutionary War present a noble monument of dignity, moderation, and good faith. They are repertories of statesmanlike principles and juridical knowledge."

[3] JAMES BRYCE ON THE SENATE AS AN EXECUTIVE AND JUDICIAL BODY.

"The Senate is not only a legislative but also an executive Chamber; in fact in its early days the executive functions seem to have been thought the more important; and Hamilton went so far as to speak of the national executive authority as divided between two branches, the President and the Senate. These executive functions are two, the power of approving treaties, and that of confirming nominations to office submitted by the President.

"To what has already been said regarding the functions of the President and Senate as regards treaties (see above, [Bryce, vol. I] chap. VI) I need only add that the Senate, through its right of confirming or rejecting engagements with foreign powers, secures a general control over foreign policy. It is in the discretion of the President whether he will communicate current negotiations to it and take its advice upon them, or will say nothing till he lays a completed treaty before it. One or other course is from time to time followed, according to the nature of the case, or the degree of friendliness existing between the President and the majority of the Senate. But in general, the President's best policy is to keep the leaders of the senatorial majority, and in particular the committee on Foreign Relations, informed of the progress of any pending negotiation. He thus feels the pulse of the Senate, and foresees what kind of arrangement he can induce it to sanction, while at the same time a good understanding between himself and his coadjutors is promoted. It is well worth his while to keep the Senate in good humor, for, like other assemblies, it has a collective self-esteem which makes it seek to gain all the information and power it can draw in. The right of going into secret session enables the whole Senate to consider despatches communicated by the President; and the more important ones, having been first submitted to the Foreign Relations committee, are thus occasionally discussed without the disadvantage

fined to Executive session, but more frequently the injunction of secrecy has been removed and the debate carried on in

of publicity. Of course no momentous secret can be long kept, even by the committee, according to the proverb in the Elder Edda—'Tell one man thy secret, but not two; if three know, the world knows.'

"This control of foreign policy by the Senate goes far to meet that terrible difficulty which a democracy, or indeed any free government, finds in dealing with foreign Powers. If every step to be taken must be previously submitted to the governing assembly, the nation is forced to show its whole hand, and precious opportunities of winning an ally or striking a bargain may be lost. If on the other hand the executive is permitted to conduct negotiations in secret, there is always the risk, either that the governing assembly may disavow what has been done, a risk which makes foreign states legitimately suspicious and unwilling to negotiate, or that the nation may have to ratify, because it feels bound in honor by the act of its executive agents, arrangements which its judgment condemns. The frequent participation of the Senate in negotiations diminishes these difficulties, because it apprises the executive of what the judgment of the ratifying body is likely to be, and it commits that body by advance. The necessity of ratification by the Senate in order to give effect to a treaty, enables the country to retire from a doubtful bargain, though in a way which other Powers find disagreeable, as England did when the Senate rejected the Reverdy Johnson treaty of 1869. European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful *coup* in foreign policy, or how a consistent attitude can be maintained if there is in the chairman of the Foreign Relations committee a sort of second foreign secretary. The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the Old World. The republic keeps consistently to her own side of the Atlantic; nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts beyond its own frontiers. It is the easier for the Americans to practice this reserve because they need no alliances, standing unassailable in their own hemisphere. The circumstances of England, with her powerful European neighbors, her Indian Empire, and her colonies scattered over the world, are widely different. Yet different as the circumstances of England are, the day may come when in England the question of limiting the at present all but unlimited discretion of the executive in foreign affairs will have to be dealt with; and the example of the American Senate will then deserve and receive careful study. Yet it must be remembered that many of the most important acts done in the sphere of foreign relations are purely executive acts (as for instance, the movement of troops and ships,) which the Senate cannot control.

open session.[4] As a general rule, the terms of the treaty become public property, and the views of senators in regard

"The Senate may and occasionally does amend a treaty, and return it amended to the President. There is nothing to prevent it from proposing a draft treaty to him, or asking him to prepare one, but this is not the practice. For ratification a vote of two-thirds of the senators present is required. This gives great power to a vexatious minority, and increases the danger, evidenced by several incidents in the history of the Union, that the Senate or a faction in it may deal with foreign policy in a narrow, sectional, electioneering spirit. When the interest of any group of States is, or is supposed to be, opposed to the making of a given treaty, that treaty may be defeated by the senators from those States. They tell the other senators of their own party that the prospects of the party in the district of the country whence they come will be improved if the treaty is rejected and a bold aggressive line is taken in further negotiations. Some of these senators, who care more for the party than for justice or the common interests of the country, rally to the cry, and all the more gladly if their party is opposed to the President in power, because in defeating the treaty they humiliate his administration. Supposing their party to command a majority, the treaty is probably rejected, and the settlement of the question at issue perhaps indefinitely postponed. It may be thought that the party acting so vexatiously will suffer in public esteem. This happens in extreme cases; but the public are usually so indifferent to foreign affairs, and so little skilled in judging of them, that offences of the kind I have described may be committed with practical impunity. It is harder to fix responsibility on a body of senators than on the executive; and whereas the executive has usually an interest in settling diplomatic troubles, whose continuance it finds annoying, the Senate has no such interest, but is willing to keep them open so long as there is a prospect of sucking some political advantage out of them. The habit of using foreign policy for electioneering purposes is not confined to America. We have seen it in England, we have seen it in France, we have seen it even in monarchical Germany. But in America the treaty-confirming power of the Senate opens a particularly easy and tempting door to such practices." Bryce's American Commonwealth, Vol. I, pp. 102–105.

[4] The injunction of secrecy on messages transmitting treaties and papers relating thereto always remains until removed by formal resolution. In the case of the fisheries treaties with Great Britain, known as the Bayard-Chamberlain treaty of 1888, there was a long debate on the motion to remove the injunction. The treaty meanwhile was published in Canada where it was debated in the Dominion Parliament. The treaty of Washington of 1871 was published while the debate was in progress in Executive Session and this caused an investigation to be ordered for the purpose of ascertaining how it was obtained by the paper publishing it. The treaty of 1898 with Spain was transmitted by the President to the Senate on January 4,

thereto become equally well known, within a very short time after its conclusion by the commissioners. On more than one occasion amendments have been suggested by the Senate and the treaty returned to the commissioners for new negotiations, or amendments have been prepared by the Senate and the ratification made subject to the acceptance of the treaty in its amended form by the other government.[5] Even after a two-thirds majority has expressed its approval of the treaty, and before it is returned to the President with a resolution in favor of its ratification, the President still has another opportunity of considering whether or not he will sign the resolution of ratification and deliver the treaty to the State Department, for formal exchange of the ratification thereof[6] with the other contracting power.

§ 466. **Congressional power over operation of treaties.**— After such ratification the treaty according to the Constitution becomes the supreme law of the land. It is still, however, within the power of a majority of the House of

1899. The injunction of secrecy was removed on January 11, 1899, and the papers printed it, but the debate on the ratification proceeded in Executive Session until the vote was taken.

The injunction of secrecy concerning all matters in Executive Session of the Senate, of which a record was kept in the Executive Journal, was removed by resolution of the Senate adopted June 28, 1886.

[5] Scribner's Magazine for January, 1902, contains a very interesting article by Henry Cabot Lodge, U. S. Senator for Massachusetts, in which he refers to numerous occasions on which the Senate has *advised* the Executive as to the negotiations of treaties; and also to no less than sixty-eight specific instances in which the Senate has amended treaties before ratifying them; this list includes the Jay treaty of 1794 with Great Britain and the treaty of 1848 with Mexico.

[6] The treaty itself generally contains some provision for the exchange of ratifications, the place generally being the capital of one of the contracting powers, and the time from three to twelve months after the signature, depending upon the time required for the legislative and executive departments of the respective governments to ratify it, according to constitutional requirements. The treaties with the ratifications are generally exchanged by the accredited representatives of one part with the Secretary of State (or corresponding official of the Executive Department) of the other. Sometimes as in the case of the treaty of Washington, of 1871, when J. C. Bancroft Davis was sent to London for that purpose, a special representative is sent with the treaty and ratifications.

Representatives to render the treaty ineffectual by refraining from passing the necessary legislation to carry it into effect. Indeed, if by any revulsion in popular feeling the political complexion of the Senate should be changed, a majority of both houses of Congress (or of two-thirds of both houses in case of veto by the President) can absolutely abrogate the treaty by enacting hostile or conflicting legislation.[1] Such course would, indeed, be inconsistent with good faith and with the long established, and honorable course pursued by the Congress of the United States. The power, however, exists to do so, and could be exercised if Congress saw fit. It can readily be seen, therefore, that while the treaty-making power is apparently absolute and unlimited, these checks and balances practically prevent it from being exercised in any manner detrimental to the best interest of the Government and of the people.

§ 467. **Diversity of opinions in regard to limitations on the treaty-making power.**—If we continue the examination of the subject-matter of this chapter, we must acknowledge that it can only be in the nature of investigation, and collation, of opinions which have already been expressed by those who have given the matter their consideration, and that it will be impossible to reach any definite conclusion, on account of the many diverse opinions which have been expressed in regard to it, by men whose opinions are entitled to the highest respect, and which have undoubted weight, with legislatures and with courts.

Thomas Jefferson is credited with the statement that the United States could not exercise its treaty-making power in regard to matters wholly within State jurisdiction to any greater extent than Congress could exercise its legislative powers:[1] in this respect, however, he has certainly been over-

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[1] This subject is so fully treated in Chapter XII, in this volume *ante*, that no further reference will be made to it at this point. The reader is referred to the headlines of that chapter.

§ 467.

[1] Wharton's Int. Law Digest, vol. II, p. 16. For views of Jefferson and Hamilton as to the power of the Central Government to alienate territory see extracts from opinion of Justice WHITE in *Downes* vs. *Bidwell* (*Insular Case*), U. S. Sup. Ct. 1901, 182 U. S., 244, see p. 316, quoted at length in INSULAR CASES APPENDIX, pp. 486, 487, volume I.

ruled by the Supreme Court, for that tribunal on numerous occasions has distinctly held that the treaty-making power could, and did, regulate the descent of property, as well as other matters under State jurisdiction, and that in doing so it can supersede all conflicting State laws, which Congress in the absence of treaty stipulations could not possibly do by ordinary legislation.[2]

§ 468. **Views expressed by the Supreme Court in the License Cases.**—In the preceding chapters on the effect of treaties on State legislation, cases were cited in which the Supreme Court of California expressed some doubt as to the extent of the treaty-making power,[1] referring to the decisions of the Supreme Court of the United States in the *License*[2] and *Passenger*[3] *Cases*. Mr. Justice Daniel in his concurring opinion in the *License* cases refers to the extent of the treaty-making power as follows: "By the 6th article and 2d clause of the constitution it is thus declared:—'That this constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land.'

"This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers;

[2] Chapter XI of this volume *ante*, is devoted to the relative effect of State laws and treaty stipulations. § 468.

[1] § 358, p. 59, *ante*.

[2] *The License Cases*, U. S. Sup. Ct. 1847, 5 Howard, 504–633, TANEY, Ch. J., MCLEAN, CATRON, DANIEL WOODBURY, GRIER, JJ. The remarks quoted appear at p. 613.

[3] See note to § 469.

for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a State and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States."

§ 469. **Views in the Passenger Cases of 1849.**—In the *Passenger Cases*[1] the opinion of Chief Justice Taney in respect to the treaty power is as follows: "The first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any

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[1] *The Passenger Cases*, U. S. Sup. Ct. 1849, 7 Howard, 283, TANEY, Ch. J., MCLEAN, WAYNE, CATRON, MCKINLEY, GRIER, DANIEL, WOODBURY, JJ. All of the Justices wrote opinions. The court being equally divided there was no opinion of the court. See Syllabus. The extract quoted from the Chief Justices' opinion is on p. 465.

person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute."[2]

§ 470. **Both of above opinions obiter; no specific treaties involved.**—No particular treaty was under consideration in either of these cases; in both cases the question was whether or not *general* treaty relations of the United States with foreign powers, granting to their respective citizens reciprocal privileges of immigration, travel and right to carry on business in the territory of the other, prevented the States from imposing restrictions in the way of passenger taxes and license fees which would interfere with the treaty rights of aliens. The court held, as expressed in the above quoted opinions, that no treaty stipulation existed which would be a bar to the action. As the cases were decided on entirely different points, the remarks are to a great extent *obiter*, and as no particular treaty was involved, and no treaty was declared void, they cannot be considered as expressing the opinion of the court to any further extent than as a general declaration that there must be some limitation to the proper exercise of the treaty-making power, but that such limitations cannot be defined until the occasion arises for doing so in regard to some specified treaty which has overstepped those limitations.

§ 471. **Justice Swayne's earlier views expressed at Circuit.**—An opinion rendered by Mr. Justice Swayne in 1866,[1] while sitting as a Circuit Justice, has been cited on the limitation side of the question; in this he said that "a treaty is declared by the Constitution to be the law of the land," but

[2] The Chief Justice then cites: *Holmes* vs. *Jennison*, U. S. Sup. Ct. 1840, 14 Peters, 540. *Groves* vs. *Slaughter*, U. S. Sup. Ct. 1841, 15 Peters, 449, McLEAN, J. *Prigg* vs. *Pennsylvania*, U. S. Sup. Ct. 1842, 16 Peters, 539, STORY, J.

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[1] *United States* vs. *Rhodes*, U. S. Cir. Ct. 1866, 1 Abb. U. S. Rep. 28, at p. 43, SWAYNE, J.

adds, "What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the National Government is limited, though supreme in its sphere of operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged, a grant of power must be shown or the act is void." A number of treaty instances are then referred to in which Indians, colored persons and inhabitants of other countries are made citizens of the United States. All of these remarks, however, are preceded by the sentence: "These powers are not involved in the question before us, and it is not necessary, particularly to consider them"—thus showing that the whole matter was purely *obiter* so far as that case was concerned.

§ 472. **Justice Swayne's later views expressed in the Supreme Court; Hauenstein vs. Lynham; The Cherokee Tobacco.**—Mr. Justice Swayne's thoroughly considered and authoritative opinion in regard to the treaty-making power, when the matter was squarely before the court has been particularly referred to in a previous chapter, in which his decision in the case of *Hauenstein* vs. *Lynham*, decided in 1879 is discussed at length.[1] Mr. Justice Swayne also elsewhere expressed his views on this question[2] declaring that "it need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." Undoubtedly there are cases in which it has been held that treaties could not provide for anything to be done which would be in direct violation of the Constitution. In the case last cited, however, the question involved was the relative weight of treaties and acts of Congress, and which of the two

§ 472.

[1] *Hauenstein* vs. *Lynham*, U. S. Sup. Ct. 1879, 100 U. S. 483, SWAYNE, J., and see extracts from opinion in § 334 of chap. XI, p. 20, *ante*.

[2] *The Cherokee Tobacco*, U. S. Sup. Ct. 1870, 11 Wallace, 616, SWAYNE, J., and see § 378, p. 84, *ante*.

should supersede the other in case of conflict; no questions were raised on the record as to the right of the United States to make the treaty under consideration.

§ 473. **Justice McLean's views in Lattimer vs. Poteet.**—Mr. Justice McLean, in construing a certain clause in a treaty made with the Cherokee Indians relating to territory entirely within the domain of one of the States, said that the case involved the power of the United States to vary private rights by treaty. He declared that it could not be denied "that the parties to a treaty are competent to determine any disputes respecting its limits." Continuing he said: "It is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government within its constitutional powers, neither the rights of a state nor those of an individual can be interposed."[1]

The views of Chancellor Kent[2] and Justice Field have already been referred to.[3]

§ 474. **Northeastern boundary controversy; views of Daniel Webster and Chancellor Kent.**—In 1842 the dispute[1]

§ 473.

[1] *Lattimer* vs. *Poteet*, U. S. Sup. Ct. 1840, 14 Peters, 4, McLEAN, J.

[2] § 272, p. 411, vol. I.

[3] See *Geofroy* vs. *Riggs*, U. S. Sup. Ct. 1890, 133 U. S. 258, FIELD, J., and extracts from opinions in § 335, p. 23, *ante*. For a comparison of views of Chancellor Kent and Justice Field see § 426, p. 239, *ante*.

§ 474.

[1] NOTE ON SETTLEMENT OF BOUNDARY DISPUTES WITH GREAT BRITAIN.

The entire northern boundary of the United States has been the subject of controversy between this country and Great Britain, since 1783. This was the natural result of the boundaries having been fixed originally without actual survey. There have been several arbitrations, numerous boundary commissions, and not less than eleven treaties amongst them (exclusive of those relating to Alaska boundary): the Provisional Articles of 1782 (U. S. Tr. and Con. 1889, p. 370); Definitive Treaty of Peace, 1783 (Id., p. 375); Jay Treaty of 1794 (Id., p. 379, and see p. 382, as to St. Croix River); Explanatory Articles, 1798, as to River St. Croix (Id., p. 396); Treaty of Ghent, 1814 (Id., p. 399); (for Declarations of Commissioners thereunder as to the boundaries, see Id., pp. 405, *et seq.*); Fisheries and Boundaries, 1818 (Id., p. 415, for art. II, relating to Northwest boundary of Lake of Woods to Stony [Rocky]

between this country and Great Britain over the northeastern boundary reached a very acute condition. Both coun-

Mountains, see p. 416, and for art. III as to joint occupation of disputed territory west of Mountains to Pacific, see pp. 416–417); Continuing joint occupation west of Rocky Mountains, 1827 (Id., p. 426); Submitting Northeastern boundary to arbitration, 1827 (Id., p. 429); Webster-Ashburton treaty of 1842, settling Northeastern boundary (Id., p. 432); Buchanan-Pakenham treaty of 1846, adjusting northwestern boundary (Id., p. 438); Treaty of Washington, 1871, referring disputed points in last mentioned treaty to arbitration (Id., p. 478). See Wharton's Int. Law Digest, Vol. II, §§ 150, *et seq.*

It will thus be seen that from 1782 to 1842 efforts had been made to properly delimitate the northeastern boundary. The arbitration of 1827 had been unsatisfactory to both countries and matters reached a crisis in 1842. Lord Ashburton then came to the United States and a treaty was prepared which has ever since been known as the Webster-Ashburton treaty. Articles I and II fixed a line which has ever since been recognized as the boundary between this country and Great Britain from the Atlantic ocean to the Rocky Mountains. No cession was actually made as the territory through which the northeastern boundary ran was described as "disputed territory."

Articles IV and V of the treaty (U. S. Tr. and Con. 1889, p. 435, U. S. Treaties in Force, 1889, p. 228), are as follows:

ARTICLE IV.

Grants of land, &c., within the territory.

All grants of land heretofore made by either party, within the limits of the territory which by this treaty falls within the dominions of the other party, shall be held valid, ratified, and confirmed to the persons in possession under such grants, to the same extent as if such territory had by this treaty fallen within the dominions of the party by whom such grants were made; and all equitable possessory claims, arising from a possession and improvement of any lot or parcel of land by the person actually in possession, or by those under whom such person claims, for more than six years before the date of this treaty, shall, in like manner, be deemed valid, and be confirmed and quieted by a release to the person entitled thereto, of the title to such lot or parcel of land, so described as best to include the improvements made thereon; and in all other respects the two contracting parties agree to deal upon the most liberal principles of equity with the settlers actually dwelling upon the territory falling to them, respectively, which has heretofore been in dispute between them.

ARTICLE V.

Distribution of the "disputed territory fund."

Whereas in the course of the controversy respecting the disputed territory on the northeastern boundary, some moneys have been received by the authorities of Her Britannic Majesty's province of New Brunswick, with the intention of preventing depredations on the forests of the said territory,

tries made claims to a large extent of territory and some adjustment had to be arrived at in order to prevent actual

which moneys were to be carried to a fund called the 'disputed territory fund,' the proceeds whereof it was agreed should be hereafter paid over to the parties interested, in the proportions to be determined by a final settlement of boundaries, it is hereby agreed that a correct account of all receipts and payments on the said fund shall be delivered to the Government of the United States within six months after the ratification of this treaty; and the proportion of the amount due thereon to the State of Maine and Massachusetts, and any bonds or securities appertaining thereto shall be paid and delivered over to the Government of the United States; and the Government of the United States agrees to receive for the use of, and pay over to, the States of Maine and Massachusetts, their respective portions of said fund, and further, to pay and satisfy said States, respectively, for all claims for expenses incurred by them in protecting the said heretofore disputed territory and making a survey thereof in 1838; the Government of the United States agreeing with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of Her Britannic Majesty."

The Northeastern boundary dispute was the subject of a great deal of Congressional, and other, debate, and many reports and books were published thereon, amongst them (taken from Poor's Index of Documents):

Message on Relations with Great Britain. President Martin Van Buren. Feb. 9, 1839, Ex. Docs., No. 181, 25th Cong., 3d sess., Vol. IV. 136 pp., 8vo.

Transmitting report of the Secretary of State, and accompanying correspondence, on the subject of the territorial relations of the United States and Great Britain, questions as to boundaries, neutrality, etc.

Report on Northeastern Boundary. Foreign Relations Committee. Feb. 28, 1839, Senate Docs., No. 272, 25th Cong., 3d sess., Vol. IV., 2 pp., 8vo.

Recommends adoption of resolutions denying the existence of any agreement that the territory in dispute on the northeastern boundary shall be placed under the jurisdiction of the British Government until the final settlement of the boundary question, and asserting that if the British Government shall attempt by military force to assume jurisdiction over this territory the exigency will have occurred rendering it the duty of the President to call forth the militia for the purpose of repelling such an invasion.

The Northeastern Boundary. Albert Gallatin, 1840. Published by Samuel Adams, New York, 179 pp., with 8 maps.

The right of the United States to the northeastern boundary claimed by them under the treaty of 1783.

Message on the Northeastern Boundary. President Martin Van

hostilities. The controversy was finally settled by the Webster-Ashburton Treaty and a part of the territory

Buren. Jan. 22, 1840, Senate Docs., No. 107, 26th Cong., 1st sess., Vol. III, 66 pp., 8vo.

Response to Senate resolution; Copies of correspondence relating to boundary and jurisdiction of the disputed territory; also in relation to establishment of military posts in the State of Maine.

Message on the Northeastern Boundary. President Martin Van Buren. Jan. 29, 1840, Senate Docs., No. 266, 26th Cong., 1st sess., Vol. V, 14 pp., 8vo.

Additional correspondence relative to adjustment of boundary and occupation of disputed territory.

Message relating to Northeastern Boundary. President John Tyler. Feb. 5, 1842, Senate Docs., No. 97, 27th Cong., 2d sess., Vol. II, 10 pp., 8vo.

Report of commissioners appointed for the exploration and survey of boundary line between Maine and New Hampshire and the British provinces; Expenditures and estimates for completion of the work; Commissioners: James Renwick, A. Talcott, and J. D. Graham.

Message on the Northeastern Boundary. President John Tyler. Feb. 26, 1842, House Docs. No. 109, 27th Cong., 2d sess., Vol. II, 1 p., 8vo.

Declines giving information on the subject.

Message on the Maine and New Hampshire Boundary. President John Tyler, April 7, 1842, House Docs., No. 31, 27 Cong., 3 sess., Vol. III, 49 pp.

Report of northeastern boundary commissioners on Maine and New Hampshire boundary, with map.

Northeastern Boundary. Daniel Webster. Aug. 11, 1842, House Docs., No. 2, pp. 25–104, 27th Cong., 3d sess., Vol. I.

Treaty with Lord Ashburton, and correspondence with same and with authorities of the States of Maine, New Hampshire, and Massachusetts.

Memoir on the Northeastern Boundary. Albert Gallatin, 1843. Library of the State Department, 74 pp., with map.

Memoir on the northeastern boundary in connection with Mr. Jay's map, together with a speech on the same subject by Hon. Daniel Webster.

Message on Northeastern Boundary. President James K. Polk. Feb. 9, 1846, House Ex Docs., No. 110, 29th Cong., 1st sess., Vol. IV, 78 pp.

Correspondence with Great Britain in relation to the "Washington treaty;" Free navigation of St. John River; Disputed territory fund.

Message on Northeastern Boundary. President James K. Polk. April 3, 1846, Senate Docs., No. 274, 29th Cong., 1st sess., Vol. V, 22 pp.

Transmits correspondence of British Minister and Secretary of State from June, 1840, to March, 1841, relative thereto.

Memorial for Indemnity for Lands Ceded to Great Britain. March 22, 1848, Senate Mis. Docs., No. 91, 30th Cong., 1st sess., Vol. I, 3 pp.

claimed by the State of Maine was included in the territory relinquished by the United States to Great Britain. Daniel Webster, then Secretary of State, declared in the course of the correspondence that the United States had no power to dispose of any part of the territory of a State by treaty without the consent of the State.[2] Chancellor Kent differed with him declaring, that "the better opinion would seem to be that such a power of cession does reside exclusively in the treaty-making power under the Constitution, although a safe discretion would forbid the exercise of it without the consent of any State."[3] Forty-five years later this opinion was di-

Citizens of Maine ask for payment for lands in former limits of Maine ceded by treaty.

Report on Claims of Maine and Massachusetts. Senator Bradbury. Dec. 29, 1852, Senate Reports, No. 361, 32d Cong., 2d sess., Vol. I, 24 pp.

On claims of Maine and Massachusetts to indemnity for lands conveyed by those States to enable the Government to fulfill stipulations in the treaty of Washington. Favorable.

Report on claims of Maine and Massachusetts. Rep. David Ritchie. May 4, 1858, House Reports, No. 366, 35th Cong. 1st sess., Vol. III, 2 pp.

On claims of the States of Maine and Massachusetts arising under the treaty "to settle and define the boundaries between the United States and the possessions of Great Britain;" Claims for protected disputed territory in 1839–41. Committee favorable to payment of claim.

Resolution relating to the Northeastern Boundary. Maine Legislature. Jan. 20, 1871, House Misc. Docs., No. 41, 41st Cong., 3d sess., Vol. I, 4 pp.

In favor of the owners of certain land on the northeastern boundary of the State of Maine being paid for it, as it was ceded to Great Britain by the United States.

Report on Lands Ceded to Great Britain. Senator Wadleigh. July 15, 1876, Senate Reports, No. 466, 44th Cong., 1st sess., Vol. II, 3 pp.

Favorable to providing for the compensation of owners of lands ceded by the United States to Great Britain in and by the treaty of Washington of July 9, 1842.

[2] For reference to correspondence in regard to this treaty see Wharton's Int. Law Dig.. Vol. II, § 150c, pp. 175, *et seq.*

For views of Jefferson and Hamilton see note 1 to § 467, p. 382, *ante*.

[3] So quoted by Professor Woolsey in his International Law, § 103, p. 161, 6th ed. See also Lecture VIII, part 1 of Kent's Commentaries, while treating of the law of nations, in which he says (p. 167):

"There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without re-

rectly controverted by Justice Field in his opinion in *Geofroy* vs. *Riggs*,[4] which has already been cited, and which evidently referred to the Chancellor's opinion. Justice Field declared, that while the treaty-making power of the United States extended to all proper subjects of negotiation, and is in terms unlimited, except by those restraints which are found in the instrument itself against the action of the government, or of its departments, or from those arising from the nature of the government itself, and that of the States, it would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent; the learned Justice continued, however, "with

serve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a state may withhold from the executive department the power of transferring what belongs to the state; but if there be no express provision of that kind, the inference is, that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and wants and necessities of the nations. A power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made, and foreign states could not deal safely with the government upon any other presumption. The power that is intrusted generally and largely with authority to make valid treaties of peace can, of course, bind the nation by alienation of part of its territory; and this is equally the case whether that territory be already in the occupation of the enemy or remain in the possession of the nation, and whether the property be public or private. In the case of the *Schooner Peggy*, the Supreme Court of the United States admitted that individual rights, acquired by war, and vested rights of the citizens, might be sacrificed by treaty for national purposes. So, in the case of *Ware* vs. *Hylton*, it was said to be a clear principle of national law that private rights might be sacrificed by treaty to secure the public safety, though the government would be bound to make compensation and indemnity to the individuals whose rights had thus been surrendered. The power to alienate, and the duty to make compensation, are both laid down by Grotius in equally explicit terms."

[4] *Geofroy* vs. *Riggs*, U. S. Sup. Ct. 1890, 133 U. S. 258, FIELD, J., and see other references to this statement of Justice FIELD in § 335, p. 31, *ante*, and § 435, page 238, *ante*.

these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." In one of the *Insular cases*[5] recently decided, Mr. Justice White in an opinion in which three other judges concurred, expressed some views in regard to the power of the United States to cede territory. The discussion was to some extent if not entirely *obiter* as there was no question of cession of territory by the United States involved in those cases.

§ 475. **Professor Woolsey's views on same subject.**—In his work on international law Mr. Woolsey quotes Chancellor Kent's opinion as to cessions of the territory of a State and after referring to the possibilities of such a far-reaching power, says: "But it might be asked whether the treaty-making power is not necessarily limited by the existence of states, parties to the confederation, having control for most purposes over their own territory. Could the treaty-making power blot out the existence of a State which helped to create the Union, by ceding away all its domain? Such fearful power was never lodged in the general government by the Constitution and could never be lawfully exercised in the ordinary contingencies of the confederation. Only in extreme cases, where the treaty-making power is called upon to accept the *fact* of conquest, or to save the whole body from ruin by surrendering a part, could such an exercise of power be justified."[1]

Mr. Woolsey strikes the nail on the head when he says that the power might be exercised "in order to save the whole body from ruin;" it is only in such a case that the power would be exercised to its full extent; certainly if it became necessary to save the balance of the Union by surrendering a portion of it, the power exists so that it can be exercised and the safety of the Union thus insured.

§ 476. **Conclusions deduced from the settlement of this**

[5] *Downes* vs. *Bidwell* (Insular Cases), U. S. Sup. Ct. 1901, 182 U. S. 244, BROWN, J. For concurring opinion of WHITE, J., in which SHIRAS and MCKENNA, JJ., united, and GRAY, J., concurred in substance see p. 287, and for views in regard to cession of territory, see pp. 315, *et seq.* See also extracts from this opinion in INSULAR CASES APPENDIX at end of volume I.

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[1] Woolsey's International Law, 6th ed. p. 161.

controversy.—The relations between this country and Great Britain had become so greatly strained owing to the disputes as to the Northeastern boundary that the only way to prevent war was to absolutely relinquish all title to the northeastern corner of Maine; even if any interested State had refused to grant its consent to the cession, and even if opposition had been interposed, as fortunately was not the case, the Central Government of the United States could certainly have ceded to Great Britain all that it did cede by the treaty of 1842, and thereby perform an act inuring to the benefit of every State of the Union, including the States affected by the new boundary line.

If it be said only a part of a State was involved in that case, and that although the power might possibly be exercised as to a part of a State, an entire State could not have been ceded away, the answer can only be that if the salvation of every other State in the Union depended upon the boundary line being so fixed that an entire State should be included in British possessions, and in default thereof the Union might have been plunged into a war resulting in its destruction, undoubtedly the treaty-making power in the Central Government would have been able to accomplish that result, and it might have been just as necessary to exercise it, as at times it has been necessary to amputate a limb in order to save the life itself; in such extreme cases (and it is to be hoped they will never occur) the full extent of the power would have to be exercised—regretfully indeed but nevertheless effectually.

§ 477. **Argument of strict construction not applicable to Constitution.**—There is an argument which has many times been brought forward in regard to the treaty-making power, as it has been in regard to the other powers delegated to the Central Government by the Constitution, which is that all provisions in the Constitution delegating power to the Central Government must be strictly construed; the Constitution, however, has not yet been, and it is hoped never will be, construed as a penal statute; the principle of broad construction, and extension of power, rather than of narrow construction and contraction of power, is one of the doctrines of the Supreme Court which was formulated by its greatest spokes-

man, Chief Justice Marshall, and pronounced in one of the most elaborately argued and reported cases which was ever decided by the Supreme Court, and one which has probably been cited as an authority as often, if not oftener, than any other decision of that Court.[1]

§ 478. **Gibbons vs. Ogden; Chief Justice Marshall's views on constitutional construction.**—In *Gibbons* vs. *Ogden* — in which the claim of the State of New York to grant exclusive licenses for steamboat navigation within its own waters was overthrown, and the supremacy of the Federal Government sustained—the Chief Justice used these words in opening his opinion: "This instrument [the Constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the Bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it.'

The Chief Justice then continues: "What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects

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[1] *Gibbons* vs. *Ogden*, U. S. Sup. Ct. 1824, 9 Wheaton, 1,—(the opinion commences on p. 186. See pp. 187 *et seq.*), MARSHALL, Ch. J.

of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the granteee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

§ 479. **Justice Story's views on constitutional construction.**—Mr. Justice Story in his Commentaries on the Constitution cited the words just quoted, and fully endorsed them as containing the proper rule of construction for the Constitution.[1] He also cited one of his own opinions[2] and replied to the argument of strict construction as follows: "A power, given in general terms, is not to be restricted to particular

§ 479.

[1] Commentaries on the Constitution of the United States, by Joseph Story, vol. I, § 425, p. 324.

[2] *Martin* vs. *Hunter*, U. S. Sup. Ct. 1816, 1 Wheaton, 304, STORY, J., and see § 331, p. 13, *ante*, for other opinions of Justice STORY.

cases merely because it may be susceptible to abuse, and if abused may lead to mischievous consequences. This argument is often used in popular debate, and in its common aspect addresses itself so much to popular fears and prejudices that it insensibly acquires a weight in the public mind to which it is in no wise entitled. The argument *ab inconvienti* is sufficiently open to question from the laxity of application as well as the opinion principle to which it leads. But the argument from a possible abuse of a power against its existence or use is in its nature not only perilous, but in respect to governments would shake their very foundation. . . . Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No Constitution can provide perfect guards against it. Confidence must be reposed somewhere, and in free governments the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise, and ultimately in the sovereign power of change belonging to them in cases requiring extraordinary remedies."

§ 480. **John Randolph Tucker's views on the limitation of the treaty-making power.**—Views have, however, been expressed sustaining a narrower construction of the Constitution, and closer limitations on the treaty-making power. The author quotes, but does not endorse them. Some of John Randolph Tucker's views on the limitations of the treaty-making power have already been quoted;[1] one further quotation from his recently published work on the Constitution[2] will be given at this point. He declares a great question has arisen whether the exclusive power of treaty-making vested in the President and Senate is unlimited in its operation upon all the objects for which a treaty may provide. Continuing he says: "Can a treaty by compact with a foreign nation bind all of the departments of our own government as to matters fully confided to them; can it surrender or by agreement nullify the securities for personal liberty engrafted upon the Constitution itself; can it

§ 480.

[1] See § 16, p. 32, Vol. I.

[2] Tucker on the Constitution of the United States, vol. II, § 354, pp. 723 *et seq.*

cede to a foreign power a State of the Union or any part of its territory without its consent; can it regulate commerce with foreign nations in spite of the power of Congress to regulate commerce with them; can it provide for the rates of duty to be imposed upon certain articles imported from foreign nations, or admit them free of duty, in the face of the power given to Congress to lay and collect taxes and duties; can a treaty appropriate money from the public treasury and withdraw it without the action of Congress; can a treaty dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations concerning the territory and other property of the United States? These important questions have several times arisen for discussion in our history, and upon them authoritative decisions have been made by other departments of the government, which are based upon solid reason and sound principles of constitutional construction.

"It cannot be denied that very many of these questions must be answered in the negative, or the consequence would be that, under the treaty-making power, the President and Senate might absorb all the powers of the government. In favor of the extreme claim of power for the President and Senate, it has been urged that a contract between the United States and a foreign nation must be conclusive against all departments of the government, because it is a contract; but the answer to this contention is obvious and conclusive. It involves the *petitio principii*, by assuming that the contract is complete though it trenches upon the power of the other departments of the government, without their consent. And if it be further urged that foreign nations know no party in the contract on the part of the United States except the President and Senate, the answer is equally conclusive that if our Constitution requires the consent of the departments to a treaty of the nature referred to, the foreign nation is bound to take notice of that fact, and cannot claim a completed obligation, in the absence of the consent of the other departments. The maxim upon this subject is familiar: *qui cum alia contrahit vel est, vel debet esse, non ignarus conditionis ejus.* And if it be further urged that this is too refined

a doctrine to regulate our delicate relations with foreign powers, the answer is that the treaty-making power of the Crown of Great Britain, where it involves a concession of the clear and absolute power of Parliament, has never been recognized as valid by the English Government, and has never been enforced. The Queen may make a treaty to pay ten millions of dollars to the French government, but unless Parliament appropriates the money the treaty will be ineffectual.[3] 'It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of a State.'[4]

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: a treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will."

§ 481. **John C. Calhoun's views on the treaty-making power, and his forced admission of nationality of Central Government.**—Mr. Tucker's views were largely based on the views held and expressed by his distinguished ancestors and by Mr. John C. Calhoun, the acknowledged eminent leader of the State's Rights School and of the narrow constructionists of the Constitution during the *ante-bellum* period. In his Discourse on the Constitution and Government of the United States, Mr. Calhoun says, in regard to Article VI of the Constitution making laws and treaties of the United States the supreme law of the land, that while the clause was declaratory it vested no new powers whatever in the Government or in any one of its departments; that without that clause the Constitution and the laws made in pursuance of it, and the treaties made under its authority, would have been the supreme law of the land as fully as they now are, and the judges in every State would have been bound thereby, anything in the Constitution or the laws of the State to the contrary notwithstanding. He bases the su-

[3] Citing Wharton's Int. Law Digest, 457, also 1 Mahon's History of England, p. 20.

[4] Citing Vattel, Bk. II, S. 154.

premacy of treaties solely, however, as a result of the nature of the relations between the federal government and those of the several States and their respective constitutions and laws, and wholly without regard to any of those elements of nationality and sovereignty with which Chief Justice Marshall and Justice Story clothed the United States Government. His views as to the supremacy of treaties are expressed as follows:[1] "Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers; —all others being reserved to the States and the people of the States. Beyond these the constitution is as destitute of authority, and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption. And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the constitution, or under the authority of the United States; which can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction, not even that, which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it, —or in the government of the United States,—or in any of its departments, or officers. This power, comprehensive as it is, is, nevertheless, subject to two important restrictions; one, that the law must be necessary,—and the other, that it must be proper."

But even Mr. Calhoun was obliged to admit that an element of nationality resided in the United States, for although he declared that "the theory of nationality of the government is in fact founded on fiction," he was obliged in his argument to make this concession: "If the States are national

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[1] Works of John C. Calhoun, edited by Richard K. Cralle, New York, 1888, vol. I, p. 252.

at all—or to express it more definitely—if they form a nation at all, it must be in reference to the delegated and not the reserved powers."

He then attempts to argue against this proposition on the ground that the two conditions of Federal and National Government cannot jointly exist, but we have seen that the whole basis of the Government of the United States is of a dual character, which makes it a federation as to internal matters and a nation as to external affairs. It is not necessary to go further into that element of this argument, as it has already been covered in the first chapter of this volume.

§ 482. **Concluding remarks.**—A point has been reached in the discussion of the treaty-making power of the United States, its extent and limitations, when this work must either be closed or new branches of the subject taken up, the treatment of which would materially extend these volumes in bulk, and indefinitely delay their publication. It has, therefore, been determined to postpone any further investigation until a later period and to offer to those who are interested in this subject, the result of the work which has occupied "a time and times and half a time" as the apocalyptic writers would have expressed the period of forty-two months which have been spent in preparing this work for publication, and which is now submited to the public with a sense of its many shortcomings and incompleteness, but with the hope that it may receive a favorable reception and be of some service to those who are interested in this subject. Since the summer of 1898, when the idea was first conceived of writing this book, many things have occurred; much history has been written. The questions whether or not, and on what terms, the United States could acquire and govern territory not only became practical questions, but were in many of their phases practically answered by the negotiation, conclusion and ratification of the treaty of Paris, and by the decisions of the Supreme Court in the Insular cases. The status of Cuba and its relations to this country have in many ways been established by the Platt amendment and the adoption of the Constitution in that country and the decision of the Supreme Court in *Neely* v. *Henkel*.

Questions regarding the rights and duties of this country

in regard to the Clayton-Bulwer treaty were rendered obsolete by the conclusion and ratification of the Hay-Pauncefote treaty by which it has been satisfactorily abrogated and superseded.

Many other changes have occurred. This book owed its inception largely to kindly inspiration of a man for whom the author can only faintly express the high feeling and regard which he always entertained for him as citizen, legislator and President—William McKinley of whom it may indeed be said that the country is greater for the way in which he lived and better for the way in which he died. And surely it was not by mere chance that on the day before the assassin's bullet ended his career, Mr. McKinley delivered the Buffalo speech in which he outlined the policy, the execution of which his able successor accepted as a sacred trust and which the people know that he will adhere to.

Not only in this country has the hand of death changed the personalty of the executive. As England mourned with us for the untimely death of our noble President, so we but little more than half a year previous thereto mourned with her for the loss of her Queen, who had reigned for more than sixty years, and of whom the highest praise must be condensed into the few words that she was not only a good queen but a good woman in the highest sense of both of those words.

President McKinley well knew the great extent of the treaty-making power and its importance to the welfare of this country, and it was in earnest truth that he declared that "God and man have linked the nations together," and that "The period of exclusiveness is past. The expansion of our trade and commerce is the pressing problem. Commercial wars are unprofitable. A policy of good will and friendly trade relations will prevent reprisals. Reciprocity treaties are in harmony with the spirit of the times; measures of retaliation are not." It is only through the treaty-making power that the greatest results for our foreign trade have been and can be attained. It is due to the far-seeing ability of those few men who met in 1787 in Philadelphia and framed our Constitution that the treaty-making power has been so securely and exclusively vested in the Central

Government that the greatest benefits to the entire country can be secured through it, and this volume cannot be more fittingly closed than by again referring to the words of Joseph Story, that had the framers of the Constitution done nothing else than to securely vest the treaty-making power in the Central Government, they would been entitled to immortality, and to the unending gratitude of the American people.

ADDITIONAL EXTRADITION CASES.

In re Dugan, U. S. Dist. Ct. Mass. 1874, 2 Lowell, 367, Fed. Cas. 4120, LOWELL, J. Person extradited under treaty with Great Britain, 1842, need not be confronted with witnesses; prisoner remanded.

In re Heilbronn, U. S. Dist. Ct. S. D. N. Y. 1854, Fed. Cas. 6323, INGERSOLL, J. Sufficiency of evidence; prisoner remanded.

In re Peter Kelley, U. S. Dist. Ct. Mass. 1874, 2 Lowell, 339, Fed. Cas. 7655, LOWELL, J. Power of judiciary to issue warrant without application to executive. What crimes covered by treaty; prisoner discharged.

Lascelles vs. *Georgia*, U. S. Sup. Ct. 1893, 148 U. S. 537, JACKSON, J. Affects state rendition; authorities and laws cited.

ADDITIONAL FRENCH SPOLIATION CASES.

Blagge vs. *Balch*, (also *Brooks* vs. *Codman* and *Foote* vs. *Woman's Board of Missions* decided at same time) U. S. Sup. Ct. 1896, 162 U. S. 439, FULLER, J. Payments to next of kin of bankrupts and not to assignees under act of March 3, 1891 (26 Stat. 908) brought the French Spoliation payments in the "category of payment by way of gratuity and grace, and not as of right and against the government."

TREATIES APPENDIX.

INTRODUCTORY NOTE.

The following APPENDIX contains all the treaties and conventions (other than postal), which have been concluded between the United States and foreign powers, and which have been ratified by the Senate. It also contains all the diplomatic agreements, protocols, *modi vivendi* and proclamations affecting the relations of the United States and foreign powers, which have been published in the United States Statutes at Large, the Official compilations of Treaties and Conventions of the United States, Richardson's Messages and Papers of the President, and Moore's History of International Arbitration.

The arrangement is alphabetical as to countries, the various treaties and conventions with each being arranged chronologically, the proclamations following the treaties.

For the different forms of international agreements entered into by the United States, see note 2, § 463, pp. 367, *et seq*, *ante*. (Treaties and conventions, p. 367; declarations of accession, p. 368; *modi vivendi*, p. 369; protocols and agreements, p. 370; reciprocal legislation and proclamations, p. 372.)

No treaties with Indians are included in this appendix. (For volumes containing these treaties, see chap. XIV, § 405, n. 1, pp. 200 and 201, *ante*.)

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TREATIES APPENDIX.

ALGIERS.

Treaties.

Algiers was an independent nation until 1830, when it became a province of France, and the treaties made between it and other countries have become absolute. The diplomatic relations of the United States with Algiers are now carried on through the French government and are subject to the treaty stipulations therewith. The following treaties were made prior to 1830:

I. TREATY OF PEACE AND AMITY.

Concluded September 5, 1795. 8 Stat. at L., p. 133. U. S. Tr. and Con. 1889, p. 1.

This treaty provided for the friendly treatment of citizens of the United States in consideration of an annual payment to the Dey of Algiers. It consisted of twenty-two articles containing provisions for commercial intercourse, etc.; it was superseded by the treaty of 1815. (See U. S. Treaties in Force, 1899, p. 1.)

II. TREATY OF AMITY AND PEACE.

Concluded June 30, 1815; proclaimed December 26, 1815. 8 Stat. at L., p. 224. U. S. Tr. and Con. 1889, p. 6.

This treaty, also of twenty-two articles, negotiated by Commodore Decatur, superseded the treaty of 1795. It provided for commercial intercourse and restitution of captives, and abolished the annual payment to the Dey. (See U. S. Treaties in Force, 1899, p. 1.)

III. TREATY OF PEACE AND AMITY.

Concluded December 22 and 23, 1816; proclaimed February 11, 1822. 8 Stat. at L., p. 244. U. S. Tr. and Con. 1889, p. 10.

This treaty contained twenty-two articles, renewing the privileges included in the treaty of 1815, but with an additional article annulling the special right accorded to United States vessels in case of war. It continued in force until 1830. (See U. S. Treaties in Force, 1899, p. 1.)

ARGENTINE REPUBLIC.

Treaties and Convention.

This Republic was formerly known as the Argentine Federation. The treaties are as follows:

ARGENTINE REPUBLIC.

I. Treaty for the Free Navigation of the Rivers Paraná and Uruguay.

Concluded July 10, 1853; proclaimed April 9, 1855. 10 Stat. at L., Treaties p. 233; in Spanish and English. U. S. Tr. and Con. 1889, p. 16. U. S. Treaties in Force, 1899, p. 2.

The nine articles are:

1. Free navigation of Paraná and Uruguay rivers conceded.
II. Loading and unloading vessels.
III. Marking channels.
IV. Collection of customs and other dues.
V. Possession of Martin Garcia Island.
VI. Free navigation in time of war.
VII. Accession of other South American governments.
VIII. Most favored nation clause.
IX. Ratification.

II. Treaty of Friendship, Commerce and Navigation.

Concluded July 27, 1853; proclaimed April 9, 1855. 10 Stat. at L., Treaties p. 237; in Spanish and English. U. S. Tr. and Con. 1889, p. 18. U. S. Treaties in Force, 1899, p. 4.

The fourteen articles are:

I. Amity.
II. Mutual freedom of commerce.
III. Most favored nation clause.
IV. No discriminating duties to be levied.
V. Navigation dues to be equal.
VI. Mutual privileges to vessels.
VII. Nationality of vessels.
VIII. Freedom to trade.
IX. Privileges of citizens; settling estates.
X. Exemptions from military service and forced loans; taxes.
XI. Diplomatic and consular agents.
XII. Privileges in time of war.
XIII. Mutual protection to citizens.
XIV. Ratification.

III. Extradition Convention.

Concluded September 26, 1896; proclaimed June 5, 1900. 31 Stat. at L., p. 1883; in Spanish and English.

The twelve articles are:

I. Evidence necessary.
II. Extraditable crimes.
III. Citizens excepted.
IV. Procedure.
V. Provisional arrest.
VI. Political crimes excepted.
VII. Offenses barred by limitation.
VIII. Trial only for extradited crime.
IX. Disposal of articles found on fugitive.
X. Preference among claims of several powers.
XI. Expenses.
XII. Effect, duration.

ARGENTINE REPUBLIC.

Proclamation.

The following proclamation concerns the relations of the United States with the Argentine Republic:

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from the Argentine Republic, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

AUSTRIA-HUNGARY.

Treaty and Conventions.

The treaties with Austria include Austria-Hungary. They are as follows:

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded August 27, 1829; proclaimed February 10, 1831. 8 Stat. at L., p. 398. U. S. Tr. and Con. 1889, p. 23. U. S. Treaties in Force, 1899, p. 9.

The thirteen articles are:

I. Liberty of commerce and navigation.
II. Shipping charges to be equal.
III. No discrimination in import duties.
IV. Application of two preceding articles.
V. Most favored nation treatment of products.
VI. Reciprocal right of vessels to export.
VII. Coastwise trade.
VIII. No discriminations against vessels.
IX. Most favored nation favors.
X. Consular officers authorized.
XI. Property of deceased persons.
XII. Duration.
XIII. Ratification.

II. CONVENTION RELATIVE TO DISPOSAL OF PROPERTY AND CONSULAR JURISDICTION.

Concluded May 8, 1848; proclaimed February 25, 1850. 9 Stat. at L., Treaties p. 152; in German and English. U. S. Tr. and Con. 1889, p. 27. U. S. Treaties in Force, 1899, p. 13.

The five articles are:

I. Disposal of personal property.
II. Disposal of real property held by deceased persons.
III. Protecting property of absent heirs.
IV. Consular privileges; deserters.
V. Duration.

III. EXTRADITION CONVENTION.

Concluded July 3, 1856; proclaimed December 15, 1856. 11 Stat. at L., p. 691; in German and English. U. S. Tr. and Con. 1889, p. 29. U. S. Treaties in Force, 1899, p. 15.

AUSTRIA-HUNGARY.

The five articles are:

I. Extraditable crimes; proceedings.
II. Persons not to be delivered.
III. Persons committing crimes in country where found.
IV. Duration.
V. Ratification.

IV. CONSULAR CONVENTION.

Concluded July 11, 1870; proclaimed June 29, 1871. 17 Stat. at L., p. 821; in German and English. U. S. Tr. and Con. 1889, p. 31. U. S. Treaties in Force, 1899, p. 17.

The seventeen articles are:

I. Officers recognized.
II. Exemptions and immunities.
III. Exemptions as witnesses.
IV. Use of arms and flags.
V. Inviolability of archives.
VI. Powers of acting officers.
VII. Vice-consuls and consular agents.
VIII. Applications to local authorities.
IX. Performance of notarial acts.
X. Authority as to shipping.
XI. Disputes between masters and crews.
XII. Deserters from ships.
XIII. Settlement of damages at sea.
XIV. Shipwreck proceedings.
XV. Most favored nation privileges.
XVI. Notice of death of intestates.
XVII. Duration; ratification.

V. NATURALIZATION CONVENTION.

Concluded September 20, 1870; proclaimed August 21, 1871. 17 Stat. at L., p. 833; in German and English. U. S. Tr. and Con. 1889, p. 37. U. S. Treaties in Force, 1899, p. 23.

The six articles are:

I. Requirements necessary.
II. Liability for prior offenses.
III. Former treaties continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

VI. TRADE-MARK CONVENTION.

Concluded November 25, 1871; proclaimed June 1, 1872. 17 Stat. at L., p. 917; in German, Hungarian, and English. U. S. Tr. and Con. 1889, p. 39. U. S. Treaties in Force, 1899, p. 26.

The four articles are:

I. Mutual protection of trade-marks.
II. Registration.
III. Duration.
IV. Ratification.

Proclamations.

The following proclamations concern the relations of the United States with Austria-Hungary:

AUSTRIA-HUNGARY.

1. By President Jackson, under the act of Congress of January 7, 1824 (4 Stat. at L., p. 2), removing discriminating duties of tonnage and impost from vessels and merchandise of Austria; May 11, 1829. II Richardson's Messages, p. 440.

2. By President Jackson, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Austria; June 3, 1829. II Richardson's Messages, p. 441.

3. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Austria in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; May 26, 1892. IX Richardson's Messages, p. 283.

BADEN.

Conventions.

(See also German Empire.)

I. EXTRADITION CONVENTION.

Concluded January 30, 1857; proclaimed May 19, 1857. 11 Stat. at L., p. 713; in German and English. U. S. Tr. and Con. 1889, p. 41. U. S. Treaties in Force, 1899, p. 28.

The five articles are:

I. Extraditable crimes; proceedings.
II. Persons not to be delivered.
III. Persons committing crimes in country where found.
IV. Duration.
V. Ratification.

II. NATURALIZATION CONVENTION.

Concluded July 18, 1868; proclaimed January 10, 1870. 16 Stat. at L., p. 731; in German and English. U. S. Tr. and Con. 1889, p. 43. U. S. Treaties in Force, 1899, p. 30.

The six articles are:

I. Requirements necessary.
II. Liability for prior offenses.
III. Former treaty continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

BAVARIA.

Treaty and Conventions.

(See also German Empire.)

I. CONVENTION ABOLISHING DROIT D'AUBAINE AND TAXES ON EMIGRATION.

Concluded January 21, 1845; proclaimed August 15, 1846. 9 Stat. at

BAVARIA.

L., Treaties p. 9; in German and English. U. S. Tr. and Con. 1889, p. 45. U. S. Treaties in Force, 1899, p. 33.

The seven articles are:

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Protecting property of absent heirs.
V. Disputes as to inheritances.
VI. Emigration from Bavaria not affected.
VII. Ratification.

II. EXTRADITION CONVENTION.

Concluded September 12, 1853; proclaimed November 18, 1854. 10 Stat. at L., Treaties p. 174; in German and English. U. S. Tr. and Con. 1889, p. 47. U. S. Treaties in Force, 1899, p. 35.

The six articles are:

I. Extraditable crimes; proceedings.
II. Accession of other German States.
III. Persons not to be delivered.
IV. Persons committing crimes in country where found.
V. Duration.
VI. Ratification.

III. NATURALIZATION TREATY.

Concluded May 26, 1868; proclaimed October 8, 1868. 15 Stat. at L., p. 661; in German and English. U. S. Tr. and Con., 1889, p. 49. U. S. Treaties in Force, 1899, p. 37.

The six articles are:

I. Necessary requirements.
II. Liability for prior offenses.
III. Former convention continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

There was a special protocol, simultaneously executed, explaining this treaty, which appears at the foot of the treaty in each of the volumes above referred to.

BELGIUM.

Treaties and Conventions.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded November 10, 1845; proclaimed March 31, 1846. 8 Stat. at L., p. 606; in French and English. U. S. Tr. and Con. 1889, p. 52.

Terminated August 20, 1858, by notice given by the Belgian government. (See U. S. Treaties in Force, 1899, p. 40.)

II. TREATY OF COMMERCE AND NAVIGATION.

Concluded July 17, 1858; proclaimed April 19, 1859. 12 Stat. at L., p. 1043; in French and English. U. S. Tr. and Con. 1889, p. 56.

BELGIUM.

Terminated July 1, 1875, by notice given by the Belgian government. (See U. S. Treaties in Force, 1899, p. 40.)

III. CONVENTION RELATIVE TO IMPORT DUTIES AND CAPITALIZATION OF THE SCHELDT DUES.

Concluded May 20, 1863; proclaimed November 18, 1864. 13 Stat. at L., p. 647; in French and English. U. S. Tr. and Con. 1889, p. 60.

This treaty contained five articles, and those which were not transitory were superseded by the treaty of 1875. (See U. S. Treaties in Force, 1899, p. 40.)

IV. CONVENTION FOR THE EXTINGUISHMENT OF THE SCHELDT DUES.

Concluded July 20, 1863; proclaimed November 18, 1864. 13 Stat. at L., p. 655; in French and English. U. S. Tr. and Con. 1889, p. 52. U. S. Treaties in Force, 1899, p. 41.

This treaty made the river Scheldt free to American commerce, referring to a treaty between the Netherlands and Belgium and to a protocol signed by numerous powers.

The seven articles are:

I. Scheldt dues extinguished.
II. Declaration by King of Belgium.
III. Tonnage and other dues.
IV. Payment by the United States.
V. Execution.
VI. Application.
VII. Ratification.

V. NATURALIZATION CONVENTION.

Concluded November 16, 1868; proclaimed July 30, 1869. 16 Stat. at L., p. 747; in French and English. U. S. Tr. and Con. 1889, p. 66. U. S. Treaties in Force, 1899, p. 44.

The six articles are:

I. Recognition of naturalization.
II. Liability for prior offenses.
III. Exemption from military service.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

VI. CONSULAR CONVENTION.

Concluded December 5, 1868; proclaimed March 7, 1870. 16 Stat. at L., p. 757; in French and English. U. S. Tr. and Con. 1889, p. 68.

This treaty was terminated January, 1880, by the Belgian government, and was superseded by the treaty of 1880. (See U. S. Treaties in Force, 1899, p. 46.)

VII. TRADE-MARK CONVENTION.

Concluded December 20, 1868; proclaimed July 30, 1869. 16 Stat. at L., p. 765; in French and English. U. S. Tr. and Con. 1889, p. 72.

BELGIUM.

This was an additional article to the treaty of 1858 and terminated with it July 1, 1875. (See U. S. Treaties in Force, 1899, p. 46.)

VIII. EXTRADITION CONVENTION.

Concluded March 19, 1874; proclaimed May 1, 1874. 18 Stat. at L., Treaties p. 120; in French and English. U. S. Tr. and Con. 1889, p. 73.

This treaty was terminated November 18, 1882, on the exchange of ratifications of the existing treaty of 1882. (See U. S. Treaties in Force, 1899, p. 46.)

IX. TREATY OF COMMERCE AND NAVIGATION.

Concluded March 8, 1875; proclaimed June 29, 1875. 19 Stat. at L., Treaties p. 72; in French and English. U. S. Tr. and Con. 1889, p. 76. U. S. Treaties in Force, 1899, p. 47.

The seventeen articles are:

I. Freedom of commerce and navigation.
II. Duties payable by Belgian vessels.
III. Duties payable by United States vessels.
IV. Coasting trade.
V. Import duties.
VI. Export duties.
VII. Premiums, drawbacks, etc.
VIII. Fisheries excluded.
IX. Nationality of vessels.
X. Cargoes for other countries.
XI. Warehousing.
XII. Most favored nation privileges.
XIII. Shipwrecks.
XIV. Transit duty.
XV. Trade-marks.
XVI. Duration.
XVII. Ratification.

X. CONSULAR CONVENTION.

Concluded March 9, 1880; proclaimed March 1, 1881. 21 Stat. at L., p. 776; in French and English. U. S. Tr. and Con. 1889, p. 80. U. S. Treaties in Force, 1899, p. 51.

The sixteen articles are:

I. Officers authorized.
II. Privileges.
III. Exemptions.
IV. Testimony by consular officers.
V. Arms and flags.
VI. Inviolability of consulates.
VII. Acting officers.
VIII. Vice-consuls and consular agents.
IX. Applications to local authorities.
X. Performance of notarial acts.
XI. Authority as to shipping.
XII. Deserters from ships.
XIII. Settlement of damages at sea.
XIV. Shipwreck proceedings.
XV. Estates of deceased persons.
XVI. Duration; ratification.

XI. EXTRADITION CONVENTION.

Concluded June 13, 1882; proclaimed November 20, 1882. 22 Stat. at L., p. 972; in French and English. U. S. Tr. and Con. 1889, p. 85. U. S. Treaties in Force, 1899, p. 56.

BELGIUM.

The eleven articles are:

I. Mutual delivery of accused.
II. Extraditable crimes.
III. Limit of trials.
IV. Political offenses.
V. Persons not to be delivered.
VI. Persons committing crimes in country where found.
VII. Proceedings.
VIII. Expenses.
IX. Limitations.
X. Articles in possession of accused.
XI. Duration; ratification.

XII. TRADE-MARK CONVENTION.

Concluded April 7, 1884; proclaimed July 9, 1884. 23 Stat. at L., p. 766; in French and English. U. S. Tr. and Con. 1889, p. 88. U. S. Treaties in Force, 1899, p. 59.

The three articles are:

I. Mutual protection.
II. Requirements.
III. Duration; ratification.

Proclamations.

The following proclamations concern the relations of the United States with Belguim:

1. By President Lincoln, revoking the *exequatur* of the Belgian consul at St. Louis; May 19, 1864. VI Richardson's Messages, p. 219.

2. By President Benjamin Harrison, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Belguim; July 1, 1891. IX Richardson's Messages, p. 147.

BOLIVIA.

Treaty.

(See also Peru-Bolivia, *post.*)

TREATY OF PEACE, FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded May 13, 1858; proclaimed January 8, 1863. 12 Stat. at L., p. 1003; in Spanish and English. U. S. Tr. and Con. 1889, p. 90. U. S. Treaties in Force, 1899, p. 61.

The thirty-six articles are:

I. Mutual amity.
II. Most favored nation clause.
III. Freedom of trade; coasting trade; travel.
IV. Tonnage charges.
V. Nationality of Bolivian ships.
VI. Import and export duties.
VII. Liberty to trade.
VIII. Steam vessels in Bolivia.
IX. Asylum of ports, etc.
X. Assistance to shipwrecks.
XI. Captures by pirates.

BOLIVIA.

XII. Property of decedents.
XIII. Protection to citizens.
XIV. Religious freedom.
XV. Freedom of navigation.
XVI. Neutral rights; free ships, free goods.
XVII. Contraband of war.
XVIII. Commerce permitted in case of war.
XIX. Delivery of contraband articles.
XX. Blockade.
XXI. Visitation and search.
XXII. Proof of nationality in case of war.
XXIII. Vessels under convoy.
XXIV. Adjudication of prizes.
XXV. Letters of marque forbidden.
XXVI. Navigation of the Amazon and La Plata.
XXVII. Tributaries of the Amazon and La Plata.
XXVIII. Rights of citizens in case of war.
XXIX. Confiscation forbidden.
XXX. Privileges to diplomatic and consular officers.
XXXI. Consular officers authorized.
XXXII. Exequaturs.
XXXIII. Consular exemptions.
XXXIV. Deserters from ships.
XXXV. Agreement for consular convention.
XXXVI. Duration; effect, etc., of treaty; ratification.

Proclamation.

The following proclamation concerns the relations of the United States with Bolivia:

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Bolivia, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

BOLIVIA AND PERU.

(See Peru-Bolivia, *post.*)

BORNEO.

Convention.

CONVENTION OF AMITY, COMMERCE AND NAVIGATION.

Concluded June 23, 1850; proclaimed July 12, 1854. 10 Stat. at L., Treaties p. 89. U. S. Tr. and Con. 1889, p. 102. U. S. Treaties in Force, 1899, p. 73.

The nine articles are:

I. Amity.
II. Liberty of commerce.
III. Protection to United States citizens.
IV. Freedom of imports and exports.
V. Tonnage on American ships; exemptions.
VI. No export duty on products of Borneo.
VII. Supplies for American ships of war.
VIII. Shipwrecks.
IX. Extraterritoriality in Borneo; ratification.

BRAZIL.

Treaties and Conventions.

The three treaties with Brazil were all made with the Emperor. They are all in force, however, having been assumed by the present government. They are as follows:

I. Treaty of Amity, Commerce and Navigation.

Concluded December 12, 1828; proclaimed March 18, 1829. 8 St. at L., p. 390. U. S. Tr. and Con., 1889, p. 105. U. S. Treaties in Force, 1899, p. 76.

The thirty-three articles are:

I. Amity.
II. Favored nation clause.
III. Freedom of commerce and navigation; coasting trade.
IV. No discrimination on vessels.
V. Import and export duties.
VI. Freedom of trade.
VII. Embargoes.
VIII. Asylum in ports.
IX. Captures by pirates.
X. Shipwrecks.
XI. Disposal of property.
XII. Special protection.
XIII. Religious freedom.
XIV. Rights of neutrals.
XV. Neutral property under enemies' flag.
XVI. Contraband of war.
XVII. Trade with nonblockaded ports.
XVIII. Seizure of contraband articles.
XIX. Blockades.
XX. Visitation and search.
XXI. Ship's papers in case of war.
XXII. Vessels under convoy.
XXIII. Prize courts.
XXIV. Letters of marque forbidden.
XXV. Protection in case of war.
XXVI. Confiscation forbidden.
XXVII. Diplomatic officers.
XXVIII. Consular officers.
XXIX. Exequaturs.
XXX. Consular exemptions.
XXXI. Deserters from ships.
XXXII. Consular convention.
XXXIII. Duration; effect, etc.; ratification.

By notice given from the Emperor of Brazil this treaty, "Only for Articles Relating to Commerce and Navigation," was terminated December 12, 1841. (See U. S. Treaties in Force, 1899, p. 76.)

II. Convention for Satisfaction of Claims of Citizens of the United States on Brazil.

Concluded January 27, 1849; proclaimed January 19, 1850. 9 Stat. at L., Treaties p. 157; in Portuguese and English. U. S. Tr. and Con. 1889, p. 115.

By this convention of six articles five hundred and thirty thousand milreis were paid by Brazil in satisfaction of claims made by United States citizens, and the amount was distributed by the United States. For an account of the proceedings of the commission under this con-

vention, see Moore's History of International Arbitration, Vol. V, p. 4609.

III. CLAIMS PROTOCOL.

Signed March 14, 1870. Moore's History of International Arbitration, p. 4687.

This protocol of six articles submitted a private claim against Brazil to arbitration. For an account of the arbitration under this protocol, see Moore's History of International Arbitration, Vol. II, p. 1733.

IV. DIPLOMATIC AGREEMENT CONCERNING TRADE-MARKS.

Concluded September 24, 1878; proclaimed June 17, 1879. 21 Stat. at L., p. 659; in Portuguese and English. U. S. Tr. and Con. 1889, p. 116. U. S. Treaties in Force, 1899, p. 86.

A short agreement of a single article conferring trade-mark rights.

Proclamations.

The following proclamations concern the relations of the United States with Brazil:

1. By President Polk, under the act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Brazil; November 4, 1847. IV Richardson's Messages, p. 522.

2. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Brazil in admitting certain articles free of duty and thus obtaining the reciprocity advantages under sec. 3 of said act; February 5, 1891. IX Richardson's Messages, p. 141.

3. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Brazil, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

BREMEN.

(See also German Empire and Prussia.)

Declaration of Accession.

ACCESSION TO EXTRADITION CONVENTION.

Concluded September 6, 1853; proclaimed October 15, 1853. 10 Stat. at L., Treaties p. 104, U. S. Tr. and Con. 1889, p. 118. U. S. Treaties in Force, 1899, p. 520.

The Free Hanseatic City of Bremen (now incorporated in the German Empire), September 6, 1853, acceded to the extradition convention between the United States and Prussia of June 16, 1852.

BRUNSWICK AND LÜNEBURG.

Convention.

(See also German Empire.)

CONVENTION RESPECTING THE DISPOSITION OF PROPERTY.

Concluded August 21, 1854; proclaimed July 30, 1855. 11 Stat. at L., p. 601; in German and English. U. S. Tr. and Con. 1889, p. 119. U. S. Treaties in Force, 1899, p. 88.

The three articles are:

I. Disposition of personal property.
II. Disposition of real estate.
III. Duration; ratification.

CENTRAL AMERICA.

Convention.

CONVENTION OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded December 5, 1825; proclaimed October 28, 1826. 8 Stat. at L., p. 322; in Spanish and English. U. S. Tr. and Con. 1889, p. 121.

This treaty, consisting of thirty-three articles, was terminated as to the articles relating to commerce and navigation, August 2, 1838, by their own limitations; the entire treaty was abrogated by the dissolution of the Republic in 1839. (See U. S. Treaties in Force, 1899, p. 90.)

CHILE.

Treaties and Conventions.

I. CONVENTION OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded May 16, 1832; proclaimed April 29, 1834. 8 Stat. at L., p. 434. U. S. Tr. and Con. 1889, p. 131.

II. CONVENTION ADDITIONAL TO THE GENERAL TREATY OF 1832.

Concluded September 1, 1833; proclaimed April 29, 1834. 8 Stat. at L., p. 456. U. S. Tr. and Con. 1889, p. 140.

These two treaties, the first containing thirty-one articles, relating to commerce and navigation, consular and diplomatic privileges, etc., and the second, containing four articles, relating to the exchange of ratifications and explanatory of certain articles in the treaty of 1832, remained in force until January 20, 1850, when they were terminated on notice given by the Chilean government. (See U. S. Treaties in Force, 1899, p. 91.)

III. CONVENTION FOR ARBITRATION OF MACEDONIAN CLAIMS.

Concluded November 10, 1858; proclaimed December 22, 1859. 12 Stat. at. L., p. 1083; in Spanish and English. U. S. Tr. and Con. 1889, p. 142.

The claims of the owners of property referred to in the treaty were sub-

mitted to the arbitration of the King of Belgium, who on May 15, 1863, rendered an award in favor of the United States allowing $42,400 with interest. (See U. S. Treaties in Force, 1899, p. 91.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1449.

IV. Claims Convention.

Concluded August 7, 1892; proclaimed January 8, 1893. 27 Stat. at L., p. 965; in Spanish and English.

This treaty of twelve articles provided for the submission of the claims of the United States citizens against Chile, and of Chilean citizens against the United States, to a commission, which met in Washington, October 9, 1893, and held their final session April 9, 1894, awarding $240,564.35 to the United States for its citizens. (See U. S. Treaties in Force, 1899, p. 92.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1469.

V. Protocol.

Signed May 24, 1897; not ratified or proclaimed. 30 Stat. at L., p. 1596; in Spanish and English.

This protocol settles the claim of Patrick Shields.

VI. Mutual Claims Convention.

Concluded May 24, 1897; proclaimed March 12, 1900. 31 Stat. at L., p. 1868; in Spanish and English.

This convention contains two articles reviving the convention of August 7, 1892.

Proclamations.

The following proclamations concern the relations of the United States with Chile:

1. By President Fillmore, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Chile; November 1, 1850. V Richardson's Messages, p. 76.

2. By President Johnson, revoking the *exequatur* of the Chilean consul at New York; February 12, 1866. VI Richardson's Messages, p. 427.

3. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727,733), suspending the prohibition of the importation of cattle from Chile, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

4. By President Cleveland, under the act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the citizens of Chile; May 25, 1896. IX Richardson's Messages, p. 693.

CHINA.

Treaties and Conventions.

(See note in regard to these treaties, and statutes conflicting therewith, under § 379, pp. 87 *et seq.*, *ante.*)

I. Treaty of Peace, Amity and Commerce.

Concluded July 3, 1844; proclaimed April 18, 1846. 8 Stat. at L., p. 592. U. S. Tr. and Con. 1889, p. 145.

The treaty of November 8, 1858, is a substitute for this treaty. (See U. S. Treaties in Force, 1899, p. 93.)

II. Treaty of Peace, Amity and Commerce.

Concluded June 18, 1858; proclaimed January 26, 1860. 12 Stat. at L., p. 1023. U. S. Tr. and Con. 1889, p. 159. U. S. Treaties in Force, 1899, p. 95.

The thirty articles are:

I. Declaration of amity.
II. Deposit of treaty.
III. Promulgation.
IV. Diplomatic privileges.
V. Visit of minister to Capital.
VI. Residence of minister at the Capital.
VII. Correspondence.
VIII. Personal interviews.
IX. Naval vessels in Chinese waters.
X. Consuls authorized.
XI. United States citizens in China.
XII. Privileges in open ports.
XIII. Shipwrecks; pirates.
XIV. Open ports; clandestine trade prohibited.
XV. Commerce permitted; tariff.
XVI. Tonnage duties.
XVII. Pilots, etc.
XVIII. Control of ships, etc.
XIX. Ships' papers, etc.
XX. Customs examinations.
XXI. Reëxportation.
XXII. Payment of duties.
XXIII. Transshipment of goods.
XXIV. Collection of debts.
XXV. Chinese teachers, etc.
XXVI. Trade with China in case of war.
XXVII. Rights of United States citizens.
XXVIII. Communications with officers.
XXIX. Freedom of religion.
XXX. Most favored nation privileges to United States citizens; ratification.

III. Treaty Establishing Trade Regulations and Tariff.

Concluded November 8, 1858. Ratifications exchanged August 15, 1859. 12 Stat. at L., p. 1069. U. S. Tr. and Con. 1889, p. 169. U. S. Treaties in Force, 1899, p. 105.

This treaty consists of a single article but has numerous rules and schedules annexed to it.

CHINA.

IV. CLAIMS CONVENTION.

Concluded November 8, 1858. Ratifications exchanged August 15, 1859. 12 Stat. at L., p. 1081. U. S. Tr. and Con. 1889, p. 178.

The arrangement made at Tien-Tsin, and called a convention by the preamble to this convention, was made through the medium of correspondence, and the supplemental convention, of November 8, 1858, was entered into to carry it into effect. Under this convention $735,238.97 was paid to the United States minister to China, and a commission appointed to decide upon the claims. The commission awarded claimants $489,187.95, and the Chinese Government refusing to receive the surplus it was finally transmitted to the United States and invested in Government bonds. From this fund there was paid out by the Secretary of State for claims against China $281,319.64, and on April 24, 1885, the balance, amounting to $453,400.90, was returned to the Chinese minister at Washington. (See U. S. Treaties in Force, 1899, p. 115.) For an account of the proceedings of this commission see Moore's History of International Arbitration, Vol. V, p. 4627.

V. TREATY OF TRADE, CONSULS AND EMIGRATION.

Concluded July 28, 1868; proclaimed February 5, 1870. 16 Stat. at L., p. 739. U. S. Tr. and Con. 1889, p. 179. U. S. Treaties in Force, 1899, p. 115.

The eight articles are:

I. Jurisdiction over land in China.
II. Regulation of commerce.
III. Chinese consuls.
IV. Religious freedom.
V. Voluntary emigration.
VI. Privileges of travel and residence.
VII. Education.
VIII. Internal improvements in China.

VI. IMMIGRATION TREATY.

Concluded November 17, 1880; proclaimed October 5, 1881. 22 Stat. at L., p. 826. U. S. Tr. and Con. 1889, p. 182. U. S. Treaties in Force, 1899, p. 118.

The four articles are:

I. Suspension of Chinese immigration.
II. Rights of Chinese in the United States.
III. Protection of Chinese in the United States.
IV. Notification of legislation; ratification.

VII. TREATY AS TO COMMERCIAL INTERCOURSE AND JUDICIAL PROCEDURE.

Concluded November 17, 1880; proclaimed October 5, 1881. 22 Stat. at L., p. 828. U. S. Tr. and Con. 1889, p. 184. U. S. Treaties in Force, 1889, p. 120.

CHINA.

The four articles are:

I. Commercial relations.
II. Importation of opium forbidden.
III. Equality of duties.
IV. Trials of actions in China.

VIII. CLAIMS AGREEMENT.

Signed 1884. Moore's History of International Arbitration, pp. 1857–1859.

This agreement submitted a private claim against China to a commission of two.

IX. CONVENTION REGULATING CHINESE IMMIGRATION.

Concluded March 17, 1894; proclaimed December 8, 1894. 28 Stat. at L., p. 1210. U. S. Treaties in Force, 1899, p. 122.

The six articles are:

I. Immigration of Chinese laborers prohibited for ten years.
II. Regulations for return to the United States.
III. Classes of Chinese not affected.
IV. Protection of Chinese in the United States.
V. Registration of citizens in China.
VI. Duration.

Proclamation.

The following proclamation concerns the relations of the United States with China:

By President Hayes, "by virtue of the authority in [him] vested by law," suspending discriminating duties of tonnage and impost as to Chinese vessels and merchandise imported in them from any country; November 23, 1880. VII Richardson's Messages, p. 600.

COLOMBIA.

Treaties and Conventions.

The Republic of Colombia, established in 1819, was divided in November, 1831, into three independent republics, New Grenada, Venezuela and Ecuador. In 1862 its name was changed to the United States of Colombia, and in 1886 the States were abolished and the country became the Republic of Colombia. The treaties with New Grenada are given in chronological order with those of Colombia.

I. TREATY OF AMITY, COMMERCE AND NAVIGATION.

Concluded October 3, 1824; proclaimed May 31, 1825. 8 Stat. at L., p. 306; in Spanish and English. U. S. Tr. and Con. 1889, p. 186.

This treaty of thirty-one articles expired by its own limitation October 3, 1836. (See U. S. Treaties in Force, 1899, p. 125.)

COLOMBIA.

II. Treaty of Peace, Amity, Navigation and Commerce.

Originally made with New Grenada. *Concluded December 12, 1846; proclaimed June 12, 1848.* 9 Stat. at L., Treaties p. 79; in Spanish and English. U. S. Tr. and Con. 1889, p. 195. U. S. Treaties in Force, 1899, p. 125.

The thirty-seven articles are:

I. Amity.
II. Most favored nation clause.
III. Commerce and navigation.
IV. Mutual privileges of shipping.
V. Customs duties.
VI. Declaration of reciprocal treatment.
VII. Freedom of trade.
VIII. Embargo.
IX. Asylum to vessels.
X. Captures by pirates.
XI. Shipwrecks.
XII. Disposal of property.
XIII. Mutual protection.
XIV. Religious freedom.
XV. Neutrality; free ships, free goods.
XVI. Enemy's property.
XVII. Contraband goods.
XVIII. Trade by neutrals.
XIX. Confiscation of contraband.
XX. Blockade.
XXI. Visitation and search.
XXII. Proof of nationality of vessels.
XXIII. Vessels under convoy.
XXIV. Prize cases.
XXV. Conduct of hostilities.
XXVI. Letters of marque.
XXVII. Protection in case of war.
XXVIII. Confiscation prohibited.
XXIX. Diplomatic privileges.
XXX. Consular officers.
XXXI. Consular rights.
XXXII. Consular exemptions.
XXXIII. Deserters from ships.
XXXIV. Agreement for consular convention.
XXXV. Isthmus of Panama; duration; violations.
XXXVI. Ratification.
Additional article. Acceptance of nationality of vessels.

III. Consular Convention.

Originally made with New Grenada. *Concluded May 4, 1850; proclaimed December 5, 1851.* 10 Stat. at L., Treaties p. 80; in Spanish and English. U. S. Tr. and Con. 1889, p. 206. U. S. Treaties in Force, 1899, p. 137.

The nine articles are:

I. Officers authorized.
II. Exequaturs.
III. Functions.
IV. Good offices.
V. Prerogatives, exemptions, etc.
VI. Legal status of consuls.
VII. Passports.
VIII. Ratification.
IX. Duration.

IV. Claims Convention.

Concluded September 10, 1857; proclaimed November 8, 1860. 12 Stat. at L., p. 985; in Spanish and English. U. S. Tr. and Con. 1889, p. 210.

COLOMBIA.

The commission under this treaty met at Washington, June 10, 1861, and adjourned March 9, 1862. Amount of awards, $496,235.47. Not having completed all the cases presented to them, the following treaty was concluded extending the commission. (See U. S. Treaties in Force, 1899, p. 141.)

V. CLAIMS CONVENTION.

Concluded February 10, 1864; proclaimed August 19, 1865. 13 Stat. at L., p. 685; in Spanish and English. U. S. Tr. and Con. 1889, p. 213.

Under this convention a new commission was organized, which met at Washington, August 4, 1865, and adjourned May 19, 1866. The awards amounted to $88,267.68. (See U. S. Treaties in Force, 1899, p. 142.) For an account of the arbitration under the two last conventions, see Moore's History of International Arbitration, Vol. II, p. 1361.

VI. CLAIMS AGREEMENT.

Signed August 17, 1874. Moore's History of International Arbitration, Vol. V, p. 4698.

This agreement submitted a private claim against Colombia, to a commission of three. For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1421.

VII. EXTRADITION CONVENTION.

Made with the Republic of Colombia. *Concluded May 7, 1888; proclaimed February 6, 1891.* 26 Stat. at L., p. 1534; in Spanish and English. U. S Treaties in Force, 1899, p. 142.

The thirteen articles are:

I. Reciprocal delivery of accused.
II. Extraditable crimes.
III. Proceedings.
IV. Persons under arrest.
V. Political offenses.
VI. Requisitions and surrender.
VII. Temporary detention.
VIII. Evidence required.
IX. Delivery of foreigners.
X. Persons not to be delivered.
XI. Persons under obligations.
XII. Expenses.
XIII. Duration; ratification.

Proclamations.

The following proclamations concern the relations of the United States with Colombia:

1. By President Arthur, under the Act of Congress of June 26, 1884, (23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from Panama and Aspinwall; January 31, 1885. VIII Richardson's Messages, p. 284.

2. By President Cleveland, under the Act of Congress of June 26, 1884 (23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from Boco del Toro; September 9, 1885. VIII Richardson's Messages, p. 310.

COLOMBIA.

3. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Colombia, in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; March 15, 1892. IX Richardson's Messages, p. 265.

4. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Colombia, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

CONGO.

(See Kongo.)

COREA.

(See Korea.)

COSTA RICA.

Treaty and Convention.

I. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 10, 1851; proclaimed May 26, 1852. 10 Stat. at L., Treaties p. 18; in Spanish and English. U. S. Tr. and Con. 1889, p. 222. U. S. Treaties in Force, 1899, p. 146.

The fourteen articles are:

I. Amity.
II. Freedom of commerce and navigation.
III. Most favored nation privileges.
IV. No discrimination in duties.
V. Tonnage duties.
VI. No discrimination on vessels.
VII. Equal trade privileges.
VIII. Equal treatment of citizens.
IX. Exemption from military service, etc.
X. Consular and diplomatic privileges.
XI. Rights in case of war.
XII. Property rights.
XIII. Duration.
XIV. Ratification.

II. CLAIMS CONVENTION.

Concluded July 2, 1860; proclaimed November 11, 1861. 12 Stat. at L., p. 1135; in Spanish and English. U. S. Tr. and Con. 1889, p. 227.

This convention of nine articles provided for a commission of three, who met at Washington February 8, 1862, and adjourned November 6, 1862. The amount awarded against Costa Rica was $25,704.14. (See U. S. Treaties in Force, 1899, p. 151.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1551.

Proclamations.

The following proclamations concern the relations of the United States with Costa Rica:

COSTA RICA.

1. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Costa Rica, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

2. By President McKinley, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright law to the citizens of Costa Rica; October 19, 1899. 31 Stat. at L., p. 1955.

DENMARK.

Treaties and Conventions.

I. Convention of Friendship, Commerce and Navigation.

Concluded April 26, 1826; proclaimed October 14, 1826. 8 Stat. at L., p. 340. U. S. Tr. and Con. 1889, p. 231. U. S. Treaties in Force, 1899, p. 152.

The twelve articles are:

I. Most favored nation clause.	VII. Property rights.
II. Freedom of trade.	VIII. Consular officers.
III. Equality as to shipping.	IX. Consular privileges.
IV. Import and export duties.	X. Consular exemptions.
V. Sound and belt dues.	XI. Duration.
VI. Trade with Danish colonies.	XII. Ratification.

This convention was abrogated by notice given April 15, 1856, and renewed by the convention of April 11, 1857, except Article V. (See U. S. Treaties in Force, 1899, p. 152.)

II. Claims Convention.

Concluded May 28, 1830; proclaimed June 5, 1830. 8 Stat. at L., p. 402; in French and English. U. S. Tr. and Con. 1889, p. 235.

By this convention Denmark renounced the claims of its subjects against the United States and agreed to pay an indemnity of $650,000 for claims of United States citizens. The commission provided for met in Washington April 4, 1831, and held its last session March 23, 1833. (See U. S. Treaties in Force, 1899, p. 156.) For an account of the proceedings of this commission see Moore's History of International Arbitration, Vol. V, p. 4549.

III. Convention Discontinuing the Sound Dues.

Concluded April 11, 1857; proclaimed January 13, 1858. 11 Stat. at L., p. 719. U. S. Tr. and Con. 1889, p. 238. U. S. Treaties in Force, 1899, p. 157.

The seven articles are:

I. Sound and Belt dues abolished.	III. Payment by the United States.
II. Lights, buoys and pilots.	

DENMARK.

IV. Most favored nation privileges.
V. Convention of 1826 revived.
VI. Effect.
VII. Ratification.

IV. CONSULAR CONVENTION.

Concluded July 11, 1861; proclaimed September 20, 1861. 13 Stat. at L. p. 605; in French and English. U. S. Tr. and Con. 1889, p. 240. U. S. Treaties in Force, 1899, p. 159.

This convention consisted of two articles additional to the existing treaties and extending the powers of consuls as follows:

I. Authority of consuls over shipping disputes.
II. Deserters from ships; ratification.

V. NATURALIZATION CONVENTION.

Concluded January 20, 1872; proclaimed April 15, 1873. 17 Stat. at L., p. 941; in Danish and English. U. S. Tr. and Con. 1889, p. 241. U. S. Treaties in Force, 1899, p. 161.

The five articles are:

I. Naturalization recognized.
II. Readmission to former status.
III. Renunciation of acquired status.
IV. Duration.
V. Ratification.

VI. AGREEMENT.

Signed February 26, 1886. U. S. Tr. and Con. 1889, p. 1186.

This agreement of two articles gave mutual exemption of vessels from readmeasurement.

VII. AGREEMENT SUBMITTING CLAIM OF CARLOS BUTTERFIELD & CO. TO ARBITRATION.

Concluded December 6, 1888; proclaimed May 24, 1889. 26 Stat. at L., p. 1490; in Danish and English.

By this agreement the claim of Butterfield & Co., for indemnity for seizure of vessels by the Danish colonial authorities of St. Thomas, West Indies, was referred to Sir Edmund Munson, by whom it was disallowed. (See U. S. Treaties in Force, 1899, p. 162.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1185.

VIII. TRADE-MARK CONVENTION.

Concluded June 15, 1892; proclaimed October 12, 1892. 27 Stat. at L., p. 963; in Danish and English. U. S. Treaties in Force, 1899, p. 163.

The four articles are:

I. Reciprocal rights.
II. Formalities.
III. Duration.
IV. Ratification.

DENMARK.

Proclamations.

The following proclamations concern the relations of the United States with Denmark:

1. By President Cleveland, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Denmark; May 8, 1893. IX Richardson's Messages, p. 395.

2. By President McKinley, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), suspending the tonnage duty on vessels coming directly from Copenhagen; July 19, 1898. 30 Stat. at L., p. 1778.

DOMINICAN REPUBLIC.

Convention.

CONVENTION OF AMITY, COMMERCE, NAVIGATION AND EXTRADITION.

Concluded February 8, 1867; proclaimed October 24, 1867. 15 Stat. at L., p. 473; in Spanish and English. U. S. Tr. and Con. 1889, p. 244.

This convention of thirty-two articles terminated January 13, 1898, by notice from the Dominican Government. (See U. S. Treaties in Force, 1899, p. 164.)

Proclamation.

The following proclamation concerns the relations of the United States with the Dominican Republic:

By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Dominica in admitting certain articles free of duty and thus obtaining the reciprocity advantages under sec. 3, of said act; August 1, 1891. IX Richardson's Messages, p. 152.

ECUADOR.

Treaties and Conventions.

I. TREATY OF PEACE, FRIENDSHIP, NAVIGATION AND COMMERCE.

Concluded June 13, 1839; proclaimed September 23, 1842. 8 Stat. at L., p. 534; in Spanish and English. U. S. Tr. and Con. 1889, p. 255.

This Treaty consisting of thirty-five articles was abrogated August 25, 1892, by notice from the Ecuadorian Government. (See U. S. Treaties in Force, 1889, p. 165.)

II. CLAIMS CONVENTION.

Concluded November 25, 1862; proclaimed September 8, 1864. 13 Stat. at L., p. 631; in Spanish and English. U. S. Tr. and Con. 1889, p. 265.

Under this convention of seven articles the commission of two members and an arbitrator met at Guayaquil, August 22, 1864, and terminated

its session, August 17, 1865. The amount awarded against Ecuador was $94,799.56. (See U. S. Treaties in Force, 1899, p. 165.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1569.

III. NATURALIZALION CONVENTION.

Concluded May 6, 1872; proclaimed November 24, 1873. 18 Stat. at L., Treaties p. 69; in Spanish and English. U. S. Tr. and Con. 1889, p. 267.

This Convention of seven articles was abrogated August 25, 1892, upon notice given by the Ecuadorian Government. (See U. S. Treaties in Force, 1899, p. 165.)

IV. EXTRADITION CONVENTION.

Concluded June 28, 1872; proclaimed December 24, 1873. 18 Stat. at L., Treaties p. 72; in Spanish and English. U. S. Tr. and Con. 1889, p. 269. U. S. Treaties in Force, 1899, p. 166.

The seven articles are as follows:

I. Persons to be delivered.
II. Extraditable crimes.
III. Political offenses, etc.
IV. Persons under arrest in country where found.
V. Procedure.
VI. Expenses.
VII. Duration; ratification.

V. CONVENTION FOR ARBITRATION OF CLAIM OF JULIO R. SANTOS.

Concluded February 28, 1893; proclaimed November 7, 1894. 28 Stat. at L., 1205; in Spanish and English.

Upon the submission of the claim to the arbitrator an award in favor of Santos was made of $40,000. (See U. S. Treaties in Force, 1899, p. 168.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1579.

Proclamation.

The following proclamation concerns the relations of the United States with Ecuador:

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Ecuador, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

EGYPT.

Agreement.

COMMERCIAL AND CONSULAR AGREEMENT.

Concluded November 16, 1884; proclaimed May 1, 1885. 24 Stat. at L. p. 1004. U. S. Tr. and Con. 1889, p. 272. U. S. Treaties in Force, 1899, p. 169.

EGYPT.

This agreement adopted the convention with Greece of sixteen articles as follows:

I. Most favored nation clause.
II. Prohibitions.
III. Importations into Egypt.
IV. Egyptian customs duties.
V. Goods excluded.
VI. Firearms.
VII. Reëxportations.
VIII. Drawbacks on reëxported goods.
IX. Egyptian export duties.
X. Effects of consular officers.
XI. Shipping regulations.
XII. Customs declarations.
XIII. Customs officials.
XIV. Fines and confiscations.
XV. Administrative regulations.
XVI. Duration.
Additional article.—Taking effect of modified tariff.

Proclamation.

The following proclamation concerns the relations of the United States with Egypt:

By President Grant, under the Act of Congress of March 23, 1874 (18 St. at L., p. 23), suspending the United States consular courts in Egypt during the pleasure of the President; March 27, 1876. VII Richardson's Messages, p. 390.

FRANCE.

Treaties and Conventions.

I. TREATY OF AMITY AND COMMERCE.

Concluded February 6, 1778; ratified by Congress May 4, 1778. 8 Stat. at L., p. 12; in French and English. U. S. Tr. and Con. 1889, p. 290.

This treaty, abrogated by the Act of Congress July 7, 1798 (1 Stat. at L., p. 578), consisted of thirty-one articles, and in many important respects formed the basis of subsequent treaties of commerce. (See U. S. Treaties in Force, 1899, p. 173.)

II. TREATY OF ALLIANCE.

Concluded February 6, 1778; ratified by Congress May 4, 1778. 8 Stat. at L., p. 6; in French and English. U. S. Tr. and Con. 1889, p. 307.

This treaty, consisting of twelve articles, provided for an alliance to carry on the war with Great Britain, for the sovereignty of the lands to be acquired as the result of the war, and the guaranty of the French possessions in America and the dominions of the United States.

An additional article was agreed to at the same time reserving to the King of Spain the right to participate in the two treaties. This additional article was also ratified by Congress May 4, 1778. 17 Stat. at L., p. 795; in French and English. U. S. Tr. and Con. 1889, p. 309.

By an Act of Congress approved July 7, 1798 (1 Stat. at L., p. 578), the treaties with France then in force were abrogated. (See U. S. Treaties in Force, 1899, p. 173.)

FRANCE.

III. CONTRACT FOR THE REPAYMENT OF LOANS MADE BY THE KING OF FRANCE.

Concluded July 16, 1782; ratified by Congress January 22, 1783. 8 Stat. at L., p. 614. U. S. Tr. and Con. 1889, p. 310.

Under this contract the United States pledged itself to pay in twelve equal annual installments of 1,500,000 livres each the amount of the indebtedness to the King of France, which was 18,000,000 livres. It was also agreed to pay the loan obtained from Holland of 10,000,000 livres in ten annual payments. (See U. S. Treaties in Force, 1899, p. 173.)

IV. CONTRACT FOR A NEW LOAN AND THE REPAYMENT OF THE OLD LOANS MADE BY THE KING OF FRANCE.

Concluded February 25, 1783; ratified by Congress October 31, 1783. 17 Stat. at L., p. 797; in French and English. U. S. Tr. and Con., 1889, p. 314.

By this agreement 6,000,000 livres were to be loaned the United States from the royal treasury in the course of the year, and to be repaid in six annual installments beginning in 1797. It was also agreed that the payments under the contract of 1782 should commence in 1787. (See U. S. Treaties in Force, 1899, p. 174.)

V. CONSULAR CONVENTION.

Concluded November 14, 1788; ratification exchanged January 6, 1790 (dated January 1, 1790). 8 Stat. at L., p. 106; in French and English. U. S. Tr. and Con. 1889, p. 316.

This convention of sixteen articles was abrogated by the act of July 7, 1798. (1 Stat. at L., p. 578.) (See U. S. Treaties in Force, 1899, p. 174.)

VI. TREATY OF PEACE, COMMERCE, AND NAVIGATION.

Concluded September 30, 1800; proclaimed December 21, 1801. 8 Stat. at L., p. 178; in French and English. Treaties and Conventions, 1889, p. 322.

This treaty consisted of twenty-seven articles and expired by its own limitations, July 31, 1809. (See U. S. Treaties in Force, 1899, p. 174.)

VII. TREATY FOR THE CESSION OF LOUISIANA.

Concluded April 30, 1803; proclaimed October 21, 1803. 8 Stat. at L., p. 200; in French and English. U. S. Tr. and Con. 1889, p. 331. U. S. Treaties in Force, 1899, p. 175.

This treaty although executed is of value in defining the extent of the cession.

The ten articles are:

I. Cession of the colony of Louisiana.
II. Extent of cession.
III. Citizenship of inhabitants.
IV. Transfer of territory.
V. Assumption of possession.
VI. Treaties with Indians.

VII. Privileges to French and Spanish ships.
VIII. Most favored nation clause.
IX. Approval of other conventions.
X. Ratification.

VIII. CONVENTION FOR THE PAYMENT OF THE PURCHASE OF LOUISIANA.

Concluded April 30, 1803; proclaimed October 21, 1803. 8 Stat. at L., p. 206; in French and English. U. S. Tr. and Con. 1889, p. 334.

Under this convention a stock amounting to $11,250,000 was created to be paid, with 6 per cent interest, in annual payments of not less than $3,000,000, the first payment to commence after fifteen years from the exchange of ratifications. (See 2 Stat. at L., p. 245; U. S. Treaties in Force, 1899, p. 178.)

IX. CLAIMS CONVENTION.

Concluded April 30, 1803; proclaimed October 21, 1803. 8 Stat. at L., p. 208; in French and English. U. S. Tr. and Con. 1889, p. 335.

The convention provided for the payment of claims of the United States citizens against France, not to exceed 60,000,000 francs. The commission organized under the convention held its first meeting, July 5, 1803, and adjourned December 1, 1804. (See U. S. Treaties in Force, 1899, p. 178.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. V, p. 4399.

X. CONVENTION OF NAVIGATION AND COMMERCE.

Concluded June 24, 1822; proclaimed February 12, 1823. 8 Stat. at L., p. 278; in French and English. U. S. Tr. and Con. 1889, p. 343. U. S. Treaties in Force, 1899, p. 179.

The nine articles are:

I. Extra duties by American vessels.
II. Extra duties by French vessels.
III. Transit and reëxportation.
IV. Ton described.
V. Shipping charges.
VI. Deserters from ships.
VII. Duration; reduction of extra duties.
VIII. Ratification.
Separate article. Refund of extra duties.

XI. CONVENTION AS TO CLAIMS AND DUTIES ON WINES AND COTTON.

Concluded July 4, 1831; proclaimed July 13, 1832. 8 Stat. at L., p. 430; in French and English. U. S. Tr. and Con. 1889, p. 345.

By this convention France agreed to pay to the United States in settlement of all claims of United States citizens 25,000,000 francs, and the United States agreed to pay in settlement of claims of the French Government and people 1,500,000 francs. Other claims not included in the provisions of the treaty were to be brought before the appropriate au-

thorities in either country. (See U. S. Treaties in Force, 1899, p. 181.) For an account of the proceedings of the commission under this convention, see Moore's History of International Arbitration, Vol. V, p. 4447.

XII. Extradition Convention.

Concluded November 9, 1843; proclaimed April 13, 1844. 8 Stat. at L., p. 580; in French and English. U. S. Tr. and Con. 1889, p. 348. U. S. Treaties in Force, 1899, p. 182.

The six articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Delivery.
IV. Expenses.
V. Political crimes, etc.
VI. Duration; ratification.

XIII. Additional Article to Extradition Convention.

Concluded February 24, 1845; proclaimed July 24, 1845. 8 Stat. at L., p. 617; in French and English. U. S. Tr. and Con. 1889, p. 349. U. S. Treaties in Force, 1899, p. 183.

Defining the crimes of robbery and burglary.

XIV. Consular Convention.

Concluded February 23, 1853; proclaimed August 12, 1853. 10 Stat. at L., Treaties p. 114; in French and English. U. S. Tr. and Con. 1889, p. 350; U. S. Treaties in Force, 1899, p. 184.

The thirteen articles are:

I. Officers recognized; exequaturs.
II. Privileges and immunities.
III. Inviolability of consulates.
IV. Complaints to authorities.
V. Agencies.
VI. Notarial authority.
VII. Property rights.
VIII. Settlement of shipping disputes.
IX. Deserters from ships.
X. Authority as to shipping.
XI. Shipwrecks.
XII. Most favored nation privileges.
XIII. Duration; ratification.

XV. Additional Article to Extradition Convention.

Concluded February 10, 1858; proclaimed February 14, 1859. 11 Stat. at L., p. 741; in French and English. U. S. Tr. and Con. 1889, p. 354. U. S. Treaties in Force, 1899, p. 189.

This treaty consists of a single article extending the treaty to the crime of embezzlement.

XVI. Trade-Mark Convention.

Concluded April 16, 1869; proclaimed July 6, 1869. 16 Stat. at L., p. 771; in French and English. U. S. Tr. and Con. 1889, p. 355. U. S. Treaties in Force, 1899, p. 189.

FRANCE.

The four articles are:

I. Protection of trade-marks.
II. Registration.
III. Duration.
IV. Ratification.

XVII. CLAIMS CONVENTION.

Concluded January 15, 1880; proclaimed June 25, 1880. 21 Stat. at L., p. 673; in French and English. U. S. Tr. and Con. 1889, p. 356.

By this convention of twelve articles, claims of United States citizens against France arising out of the French Mexican war and the war with Germany, and claims of French citizens against the United States arising out of the civil war, were referred to three commissioners. The commission met in Washington, November 5, 1880, and adjourned March 31, 1884. Awards against the United States amounted to $625,566.35, and against France to 13,659 francs, 14 centimes. (See U. S. Treaties in Force, 1899, p. 191.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1133.

XVIII. CLAIMS CONVENTION.

Concluded July 19, 1882; proclaimed December 29, 1882. 22 Stat. at L., p. 983; in French and English. U. S. Tr. and Con. 1889, p. 360.

This convention extended the term of the claims commission under the convention of 1880 until July 1, 1883. (See U. S. Treaties in Force, 1899, p. 191.)

XIX. CLAIMS CONVENTION.

Concluded February 8, 1883; proclaimed June 25, 1883. 23 Stat. at L., p. 728; in French and English. U. S. Tr. and Con. 1889, p. 361.

The term of the claims commission under the convention of 1880 was further extended by this convention to April 1, 1884. (See U. S. Treaties in Force, 1899, p. 191.)

XX. RECIPROCITY AGREEMENT.

Concluded May 28, 1898; proclaimed May 30, 1898. 30 Stat. at L., p. 1774.

This agreement established certain reciprocal reduced tariff rates under the act of July 24, 1897. (30 Stat. at L., p. 151, at p. 203.)

Proclamations.

The following proclamations concern the relations of the United States with France:

1. By President Adams, revoking the *exequaturs* of the French consuls; July 13, 1798. I Richardson's Messages, p. 270.

2. By President Adams, under the Act of Congress of February 9, 1799 (1 Stat. at L., p. 613), premitting trade with certain ports of St. Domingo; June 26, 1799. I Richardson's Messages, p. 288.

3. By President Adams, under the Act of Congress of February 27, 1800 (2 Stat. at L., p. 7), permitting trade with certain ports of St. Domingo; May 9, 1800. I Richardson's Messages, p. 302.

FRANCE.

4. By President Adams, under the Act of Congress of February 27, 1800 (2 Stat. at L., p. 7), further extending the permission to trade with St. Domingo; September 6, 1800. I Richardson's Messages, p. 304.

5. By President Monroe, under the Act of Congress of May 6, 1822 (3 Stat. at L., p. 681), suspending the act of May 15, 1820 (3 Stat. at L., p. 605), imposing duties on French vessels and goods, until the end of the next session of Congress; June 24, 1822. II Richardson's Messages, p. 183.

6. By President Polk, under the Act of Congress of March 3, 1845 (5 Stat. at L., p. 748), extending to French vessels from Miquelon and St. Pierre the same tonnage dues as paid by American vessels; April 20, 1847. IV Richardson's Messages, p. 521.

7. By President Johnson, under the Acts of Congress of January 7, 1824 (4 Stat. at L., p. 2) and of May 24, 1828 (4 Stat. at L., p. 308), removing any higher tonnage duties than vessels of the United States pay from French vessels in American ports; December 28, 1866. VI Richardson's Messages, p. 513.

8. By President Grant, under the two Acts last referred to, abolishing the discriminating duties on merchandise imported in French vessels from countries of its origin into the United States; June 12, 1869. VII Richardson's Messages, p. 15.

9. By President Grant, extending the preceding proclamation to merchandise imported from any country; November 20, 1869. VII Richardson's Messages, p. 19.

10. By President Grant, under the Act of Congress of June 11, 1864 (13 Stat. at L., p. 121), establishing French consular courts under said act; February 10, 1870. VII Richardson's Messages, p. 84.

11. By President Grant, declaring the neutrality of the United States in the Franco-Prussian war; August 22, 1870. VII Richardson's Messages, p. 86.

12. By President Grant, forbidding the use of United States ports by war vessels of France or Germany while at war with each other, except under certain conditions; October 8, 1870. VII Richardson's Messages, p. 89.

13. By President Grant, directing that the suspension of discriminating duties, as suspended by the proclamations of June 12, and November 20, 1869, shall cease; October 30, 1872. VII Richardson's Messages, p. 178.

14. By President Grant, under "the authority vested in [him] by law," abolishing discriminating duties on merchandise imported into the United States in French vessels from any country; September 22, 1873. VII Richardson's Messages, p. 228.

15. By President Cleveland, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), suspending the tonnage duty on vessels from Guadeloupe, except vessels of countries which impose discriminating duties on United States vessels; April 16, 1888. VIII Richardson's Messages, p. 742.

16. By President Benjamin Harrison, under the Act of Congress of

March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the citizens of France; July 1, 1891. IX Richardson's Messages, p. 147.

17. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from French Guiana, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

FRANKFORT.

(See proclamation affecting Frankfort under Prussia.)

GERMAN EMPIRE.

Treaties and Conventions.

The formation of the German Empire in 1871 by the consolidation of the North German Union, etc., has in some instances abrogated the treaties entered into with the independent German governments now embraced in the Empire, but reference is here given to all the separate governments with which treaties have been concluded.

See under Baden, Bavaria, Bremen, Brunswick and Lüneberg, Hanover, Hanseatic Republics, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Nassau, North German Union, Oldenburg, Prussia, Saxony, Schaumburg-Lippe, Württemburg. (See note in U. S. Treaties in Force, 1899, p. 192.)

I. Consular Convention.

Concluded December 11, 1871; proclaimed June 1, 1872. 17 Stat. at L., p. 921; in German and English. U. S. Tr. and Con. 1889, p. 363. U. S. Treaties in Force, 1890, p. 192.

The eighteen articles and the protocol are:

I. Consular officers.
II. Exequaturs.
III. Privileges and immunities.
IV. Arms and flags.
V. Inviolability of consulates.
VI. Temporary vacancies.
VII. Consular agencies.
VIII. Communications with authorities.
IX. Notarial authority.
X. Property of decedents.
XI. Effects of deceased sailors and passengers.
XII. Authority over ships.
XIII. Disputes between officers and crews of ships.
XIV. Deserters from ships.
XV. Damages to vessels at sea.
XVI. Shipwrecks.
XVII. Trade-mark protection.
XVIII. Duration; ratification.
Protocol. As to meaning of "property," and deceased citizens.

GERMAN EMPIRE.

II. COPYRIGHT AGREEMENT.

Signed January 15, 1892; proclaimed April 15, 1892. 27 Stat. at L., p. 1021.

The three articles are:

I. American citizens to have copyright in German Empire.
II. German subjects to have copyright in the United States.
III. Duration.

III. COMMERCIAL AGREEMENT.

Signed July 10, 1900; proclaimed July 13, 1900. 31 Stat. at L., p. 1935; *see also ibid.*, p. 1978.

A reciprocity agreement of two articles, under the tariff act of 1897 (30 Stat. at L., pp. 151, 203).

Proclamations.

The following proclamations concern the relations of the United States with the German Empire:

1. By President Cleveland, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), suspending the tonnage duty on vessels from German ports except vessels of countries which impose discriminating duties on United States vessels; January 26, 1888. VIII Richardson's Messages, p. 741.

2. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of the German Empire in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; February 1, 1892. IX Richardson's Messages, p. 258.

3. By President Cleveland, under the Act of Congress of June 19, 1886 (24 St. at L., p. 79), revoking the proclamation of January 26, 1888; December 3, 1896. IX Richardson's Messages, p. 697.

GREAT BRITAIN.

Treaties and Conventions.

I. PROVISIONAL TREATY OF PEACE.

Concluded November 30, 1782; proclamation ordered by Congress April 11, 1783. 8 Stat. at L., p. 54. U. S. Tr. and Con. 1889, p. 370.

The provisions of all the articles except the separate article are repeated in the definitive treaty of peace.

II. ARMISTICE.

Signed at Versailles January 20, 1783. 8 Stat. at L., p. 58; in French and English. U. S. Tr. and Con. 1889, p. 374.

Refers to the treaty signed the same day between Great Britain, France and Spain, and to the provisional treaty of peace between the

United States and Spain; declares a mutual cessation of notice refused on the terms set out in such tripartite treaty.

III. Definitive Treaty of Peace.

Concluded September 3, 1873; proclaimed January 14, 1784. 8 Stat. at L., p. 80. U. S. Tr. and Con. 1889, p. 375. U. S. Treaties in Force, 1899, p. 200.

These ten articles are:

I. Independence of the United States acknowledged.
II. Boundaries.
III. Fishery rights.
IV. Recovery of debts.
V. Restitution of estates.
VI. Confiscations and prosecutions to cease.
VII. Withdrawal of British armies.
VIII. Navigation of the Mississippi River.
IX. Restoration of territory.
X. Ratification.

IV. Treaty of Amity, Commerce and Navigation.

(Jay Treaty.)

Concluded November 19, 1794; proclaimed February 29, 1796. 8 Stat. at L., p. 116. U. S. Tr. and Con. 1889, p. 379.

This treaty consisted of twenty-eight articles and an additional article relating to the West Indian trade. Articles XI to XXVII expired by their own limitation October 28, 1807, and the entire treaty terminated by the war declared June 18, 1812. The commission under Article V made a declaration, October 25, 1798, as to the true St. Croix River named in the treaty. The commission under Article VI, to consider claims arising from obstructions of judicial remedies, met at Philadelphia May 29, 1797, and their meetings finally suspended July 31, 1799, owing to disagreements. By the treaty of 1802, $2,664,000 was provided to be paid to Great Britian in settlement of these claims. The commission under Article VII, to consider claims arising from illegal captures, met at London August 16, 1796, and suspended its sessions July 20, 1799. The meetings were resumed under the treaty of 1802 and the final meeting was held February 4, 1804. The awards against the United States amounted to $143,428.14 and against Great Britain to $11,656,000. (See U. S. Treaties in Force, 1899, p. 204.) For an account of the commission under Article V of this treaty, see Moore's History of International Arbitration, Vol. I, pp. 1–32. For an account of the commission under Article VI, see *ibid.*, Vol. I, p. 271. For an account of the commission under Article VII, see *ibid.*, Vol. I., p. 299.

V. Article Explanatory to Article III, Treaty of 1794.

Concluded May 4, 1796; ratification advised by the Senate May 9, 1796. 8 Stat. at L., p. 130. U. S. Tr. and Con. 1889, p. 395.

This article related to the passage of Indians into the territories of

both nations. The treaty of 1794 terminated by the declaration of the war of 1812. (See U. S. Treaties in Force, 1899, p. 205.)

VI. ARTICLE EXPLANATORY TO ARTICLE V, TREATY OF 1794.

Concluded March 15, 1798; ratification advised by the Senate June 6, 1798. 8 Stat. at L., p. 131. U. S. Tr. and Con. 1889, p. 396.

This article authorized the commission under Article V of the treaty of 1794 to designate the source of the St. Croix river. The declaration was made October 25, 1798. (See U. S. Treaties in Force, 1899, p. 205.)

VII. CONVENTION FOR PAYMENT OF INDEMNITIES AND SETTLEMENT OF DEBTS.

Concluded January 8, 1802; proclaimed April 27, 1802. 8 Stat. at L., p. 196. U. S. Tr. and Con. 1889, p. 398.

This convention of five articles provides for the payment to Great Britain of £600,000 in full for the claims submitted under Article VI of the treaty of 1794, and for the continuation of the commission under Article VII, and it was agreed that the awards should be paid in three annual instalments. It was also agreed that creditors of either country should meet with no impediment in the collection of their debts. (See U. S. Treaties in Force, 1899, p. 205.)

VIII. TREATY OF PEACE AND AMITY.

(TREATY OF GHENT.)

Concluded at Ghent, December 24, 1814; proclaimed February 18, 1815. 8 Stat. at L., p. 218. U. S. Tr. and Con. 1889, p. 399. U. S. Treaties in Force, 1899, p. 206.

The eleven articles are:

I. Peace declared; restoration of territory, archives, etc.
II. Cessation of hostilities.
III. Release of prisoners.
IV. Boundaries; determination of northeastern.
V. Boundaries; determination of northern, from St. Croix River to St. Lawrence River.
VI. Boundaries; determination of northern, from St. Lawrence River to Lake Superior.
VII. Boundaries; determination of northern, from Lake Huron to Lake of the Woods.
VIII. Powers of boundary commissions, etc.
IX. Cessation of hostilities with Indians.
X. Abolition of slave trade.
XI. Ratification.

Under the Treaty of Ghent there were Four Boundary Commissions as follows:

COMMISSION UNDER ARTICLE IV.—ISLANDS IN PASSAMAQUODDY BAY PART OF BAY OF FUNDY.

The commission appointed under Article IV met September, 1816, and

decided November 24, 1817, as to the ownership of the Islands in Passamaquoddy Bay. The boundary line in Passamaquoddy Bay was marked by the commissioners appointed under the treaty of 1892. (The decision of the commission is in U. S. Tr. and Con. 1889, p. 406; U. S. Treaties in Force, 1899, p. 212.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 45.

COMMISSION UNDER ARTICLE V.—BOUNDARY FROM THE SOURCE OF THE SAINT CROIX RIVER TO THE SAINT LAWRENCE RIVER.

The commission met September 23, 1816, and, having disagreed, held their last meeting April 13, 1822. By the convention of 1827 the dispute was left to the decision of the King of The Netherlands, who delivered his award January 10, 1831, which was not accepted by either Government, and the boundary was finally agreed to in the Webster-Ashburton Treaty of 1842. (See U. S. Treaties in Force, 1899, p. 213.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 65.

COMMISSION UNDER ARTICLE VI.—BOUNDARY FROM THE SAINT LAWRENCE RIVER TO LAKE SUPERIOR.

The commission met November 18, 1816, and, having agreed, held their last meeting June 22, 1822. (Their decision is given in 8 Stat. at L., p. 274; U. S. Tr. and Con. 1889, p. 407; U. S. Treaties in Force, 1899, p. 213.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 162.

COMMISSION UNDER ARTICLE VII.—BOUNDARY FROM LAKE HURON TO THE LAKE OF THE WOODS.

The commission met June 22, 1822, and, having disagreed, held their final meeting December 24, 1827. By the Convention of 1842, the boundary was agreed to by the two Governments. (See U. S. Treaties in Force, 1899, p. 215.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 171.

IX. CONVENTION OF COMMERCE AND NAVIGATION.

Concluded July 3, 1851; proclaimed December 22, 1815. 8 Stat. at L., p. 228. U. S. Tr. and Con. 1889, p. 410. U. S. Treaties in Force, 1899, p. 215.

This convention was continued in force for ten years by Article IV, treaty of 1818, and indefinitely extended by convention of August 6, 1827.

The five articles are:

I. Freedom of commerce and navigation.
II. Import and export duties; shipping; trade with British possessions in West Indies and North America.
III. Trade with British East Indies, etc.
IV. Consuls.
V. Duration; ratification.
Declaration. Vessels excluded from island of St. Helena.

GREAT BRITAIN.

X. ARRANGEMENT FOR NAVAL VESSELS ON GREAT LAKES.

Signed April, 1817; proclaimed April 28, 1818. 8 Stat. at L., p. 231; 11 *ibid*, p. 766. U. S. Tr. and Con. 1889, p. 413.

This arrangement determined the naval force to be maintained on the Great Lakes. It went into effect at the time of its signature though not assented to by the Senate, or proclaimed, for about a year.

XI. CONVENTION RESPECTING FISHERIES, BOUNDARY, AND THE RESTORATION OF SLAVES.

Concluded October 20, 1818; proclaimed January 30, 1819. 8 Stat. at L., p. 248. U. S. Tr. and Con. 1889, p. 415. U. S. Treaties in Force, 1899, p. 219.

The six articles are:

I. Fisheries.
II. Boundary from the Lake of the Woods to the Stony Mountains.
III. Country west of the Stony Mountains.
IV. Commercial convention extended.
V. Claims for restitution of slaves.
VI. Ratification.

XII. CLAIMS CONVENTION.

Concluded July 12, 1822; proclaimed January 11, 1823. 8 Stat. at L., p. 282; in French and English. U. S. Tr. and Con. 1889, p. 418.

The Emperor of Russia having decided the United States to be entitled, under Article I of the Treaty of Ghent, to the restitution of slaves carried away by the British forces, this convention provided for a commission to ascertain the average value of the slaves and to decide upon the claims for indemnity. The commission met in Washington August 25, 1823, and having fixed the average value of the slaves, on September 13, 1824, met to consider the claims. Being unable to agree, a new convention was negotiated November 13, 1826, and the commission was dissolved March 26, 1827. (See U. S. Treaties in Force, 1899, p. 222.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 350, for other commissions under this treaty, see *ibid.*, pp. 363, *et seq.*

XIII. CONVENTION RELATIVE TO INDEMNITY FOR SLAVES.

Concluded November 13, 1826; proclaimed March 19, 1827. 8 Stat. at L., p. 344. U. S. Tr. and Con. 1889, p. 424.

By this convention Great Britain agreed to pay $1,204,960 as indemnity for slaves carried away. By act of March 2, 1827 (4 Stat. at L., p. 219), a commission was authorized to settle the claims. The first meeting of the commission was held July 10, 1827, and the last August 31, 1828. (See U. S. Treaties in Force, 1899, p. 222.)

XIV. CONVENTION CONTINUING IN FORCE ARTICLE III, TREATY OF 1818.

Concluded August 6, 1827; proclaimed May 15, 1828. 8 Stat. at L., p. 360. U. S. Tr. and Con. 1889, p. 426.

This convention provided for the joint temporary occupancy of the territory west of the line that had been established to the Rocky Mountains. The boundary from the Rocky Mountains to the Pacific Ocean was agreed to by the treaty of 1846. (U. S. Treaties in Force, 1899, p. 223.)

XV. Commercial Convention.

Concluded August 6, 1827; proclaimed May 15, 1828. 8 Stat. at L., 361. U. S. Tr. and Con. 1889, p. 428. U. S. Treaties in Force, 1899, p. 223.

This convention indefinitely extended in force the commercial convention of July 3, 1815.

The three articles are:

I. Commercial convention continued.
II. Duration.
III. Ratification.

XVI. Convention Relative to the Northeastern Boundary.

Concluded September 29, 1827; proclaimed May 15, 1828. 8 Stat. at L., p. 362. U. S. Tr. and Con. 1889, p. 429.

The determination of the northeastern boundary by the commission, as provided for in Article V of the Treaty of Ghent, not having been agreed to, it was referred by this convention of eight articles to the King of The Netherlands, who on January 10, 1831, submitted an award which was not accepted by the two Governments. The boundary was finally determined by the convention of August 9, 1842. (See U. S. Treaties in Force, 1899, p. 224.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, vol. I, p. 85.

XVII. Convention as to Boundaries, Suppression of Slave Trade, and Extradition.

(Webster-Arhburton Treaty.)

Concluded August 9, 1842; proclaimed November 10, 1842. 8 Stat. at L., p. 572. U. S. Tr. and Con. 1889, p. 432. U. S. Treaties in Force, 1899, p. 225.

The twelve articles are:

I. Northeastern boundary agreed to.
II. Northern boundary, Lake Huron to Lake of the Woods.
III. Navigation of St. John River.
IV. Confirmation of prior land grants.
V. Distribution of "Disputed territory fund."
VI. Commission to mark northeastern boundary line.
VII. Channels open to both parties.
VIII. Suppression of slave trade.
IX. Remonstrances with other powers.
X. Extradition of fugitives from justice.
XI. Duration.
XII. Ratification.

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XVIII. TREATY ESTABLISHING BOUNDARY WEST OF THE ROCKY MOUNTAINS.

Concluded June 15, 1846; proclaimed August 5, 1846. 9 Stat. at L., Treaties p. 24. U. S. Tr. and Con. 1889, p. 438. U. S. Treaties in Force, 1899, p. 231.

The five articles are:

I. Boundary established; free navigation.
II. Navigation of Columbia River.
III. Property rights.
IV. Property of Puget's Sound Agricultural Company.
V. Ratification..

The maps prepared by the joint commission were duly approved and adopted. (See U. S. Tr. and Con. 1889, p. 440; and U. S. Treaties in Force, 1899, p. 233.)

XIX. CONVENTION AS TO SHIP-CANAL CONNECTING ATLANTIC AND PACIFIC OCEANS.

(CLAYTON-BULWER TREATY.)

Concluded April 19, 1850; proclaimed July 5, 1850. 9 Stat. at L., Treaties p. 174. U. S. Tr. and Con. 1889, p. 440. U. S. Treaties in Force, 1899, p. 234.

The nine articles are:

I. Declaration as to control of canal, occupation of territory, and commercial advantages.
II. Neutrality of canal in case of war.
III. Protection of construction.
IV. Mutual influence to facilitate construction.
V. Guarantee of neutrality.
VI. Co-operation of other States.
VII. Mutual encouragement to speedy construction.
VIII. Protection to other communications.
IX. Ratification.

XX. PROTOCOL CEDING HORSE-SHOE REEF TO THE UNITED STATES.

Signed December 9, 1850. U. S. Tr. and Con. 1889, p. 444.

This protocol ceded Horse-Shoe Reef in Lake Erie to the United States on the condition that it should erect a lighthouse there. This was subsequently done under appropriations by Congress for that purpose. (9 Stat. at L., pp. 380 and 627; 10 *ibid.*, p. 343.)

XXI. CLAIMS CONVENTION.

Concluded February 8, 1853; proclaimed August 20, 1853. 10 Stat. at L., Treaties, p. 110. U. S. Tr. and Con. 1889, p. 445.

The commissions authorized by this convention of seven articles met at London, September 15, 1853, and adjourned January 15, 1855. The claims considered by the commission were all those arising since December 26, 1814, and remaining unsettled. The awards in favor of

American claimants amounted to $329,734.16, and to British claimants to $277,102.88. (See U. S. Treaties in Force, 1899, p. 237.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. I, p. 391.

XXII. RECIPROCITY TREATY AS TO FISHERIES, DUTIES, AND NAVIGATION, BRITISH NORTH AMERICAN COLONIES.

Concluded June 5, 1854; proclaimed September 11, 1854. 10 Stat. at L., Treaties p. 199; U. S. Tr. and Con. 1889, p. 448.

This treaty, consisting of seven articles, granted mutual liberty of sea fisheries on the northeastern coast of the United States and the British North American provinces; it provided for the reciprocal free admission of certain articles, the produce of the British colonies or of the United States, and the right to navigate St. Lawrence River and the canals connecting the Great Lakes with the Atlantic and Lake Michigan. It was terminated by notice from the United States March 17, 1866. The commission authorized by Article I to designate the places reserved from the common right of fishing met in August, 1855, and ceased to exist by the termination of the treaty. Nearly all the work had been accomplished when the commission dissolved. (See U. S. Treaties in Force, 1899, p. 238.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. I, p. 426.

XXIII. CLAIMS CONVENTION.

Concluded July 17, 1854; proclaimed September 11, 1854. 10 Stat. at L., Treaties p. 213. U. S. Tr. and Con. 1889, p. 453.

By this convention the existence of the claims commission under the Convention of 1853 was extended four months. (See U. S. Treaties in Force, 1899, p. 238.)

XXIV. TREATY FOR THE SUPPRESSION OF AFRICAN SLAVE TRADE.
(See Article VIII, Convention of 1870.)

Concluded April 7, 1862; proclaimed June 7, 1862. 12 Stat. at L., p. 1225. U. S. Tr. and Con. 1889, p. 454; U. S. Treaties in Force, 1899, p. 238.

The twelve articles are:

I. Search of suspected slavers by war vessels.
II. Authority and procedure.
III. Indemnity for losses.
IV. Mixed courts established.
V. Reparation for wrongful seizures.
VI. Evidences of slave trading.
VII. No compensation to vessels with slave equipments.
VIII. Disposal of vessels condemned.
IX. Punishment of owners, crew, etc.
X. Release of negroes.
XI. Instructions and regulations.
XII. Ratification; duration.

XXV. ADDITIONAL ARTICLE TO THE TREATY FOR THE SUPPRESSION OF SLAVE TRADE, 1862.

Concluded February 17, 1863; proclaimed April 22, 1863. 13 Stat. at L.,

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p. 645. U. S. Tr. and Con. 1889, p. 466. U. S. Treaties in Force, 1899, p. 244.

This treaty extends the right of visit and detention to within thirty leagues of Madagascar, Puerto Rico, and Santo Domingo.

XXVI. CLAIMS TREATY.

Concluded July 1, 1863; proclaimed March 5, 1864. 13 Stat. at L., p. 651. U. S. Tr. and Con. 1889, p. 467.

By this treaty the claims of the Hudson's Bay Company and the Puget's Sound Agricultural Company against the United States were referred to a commission. The commission met in Washington, January 7, 1865, and on September 10, 1869, rendered their award of $450,000 to the Hudson's Bay Company, and $200,000 to the Puget Sound Agricultural Company. (See U. S. Treaties in Force, 1899, p. 245.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. 1, p. 237.

XXVII. NATURALIZATION CONVENTION.

Concluded May 13, 1870; proclaimed September 16, 1870. 16 Stat. at L., p. 775. U. S. Tr. and Con. 1889, p. 470. U. S. Treaties in Force, 1899, p. 245.

The four articles are:

I. Naturalization recognized.
II. Renunciation of previous naturalization.
III. Resumption of original citizenship.
IV. Ratification.

XXVIII. CONVENTION FOR THE SUPPRESSION OF SLAVE TRADE.

Concluded June 3, 1870; proclaimed September 16, 1870. 16 Stat. at L., p. 777. U. S. Tr. and Con. 1889, p. 472. U. S. Treaties in Force, 1899, p. 247.

The seven articles are:

I. Mixed courts abolished.
II. Jurisdiction over vessels seized.
III. Procedure.
IV. Instructions to war ships.
V. Former treaty continued.
VI. Notification of effect of convention.
VII. Duration; ratification.

ANNEX TO THE ADDITIONAL CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN, FOR THE SUPPRESSION OF THE AFRICAN SLAVE TRADE, SIGNED AT WASHINGTON, ON THE THIRD DAY OF JUNE, 1870.

Instructions for ships of the United States and British navies employed to prevent the African slave trade. Five articles.

16 Stat. at L., p. 779. U. S. Tr. and Con. 1889, p. 474. U. S. Treaties in Force, 1899, p. 250.

XXIX. CONVENTION AS TO RENUNCIATION OF NATURALIZATION.

Concluded February 23, 1871; proclaimed May 5, 1871. 17 Stat. at L., p. 841. U. S. Tr. and Con. 1889, p. 476.

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The Naturalization Convention of 1870 provided for the renunciation of citizenship acquired prior to that time in either country, and agreed that the manner of making such renunciation should be subsequently determined upon. This convention designated the time and method of making such renunciation of acquired citizenship. (See U. S. Treaties in Force, 1899, p. 251.)

XXX. TREATY FOR THE SETTLEMENT OF ALL CAUSES OF DIFFERENCE.

(TREATY OF WASHINGTON.)

Concluded May 8, 1871; proclaimed July 4, 1871. 17 Stat. at L., p. 863. U. S. Tr. and Con. 1889, p. 478; as to the articles now in force see U. S. Treaties in Force, 1899, p. 252.

The forty-three articles are:

I to XI, inclusive, relate to the Tribunal for arbitration of the Alabama Claims, and terminated by the rendering of the award at Geneva, September 14, 1872, of $15,500,000 to the United States.

XII to XVII, inclusive, provided for the reference of civil war claims against both Governments to a commission which met at Washington, September 26, 1871, and held its final meeting September 25, 1873, awarding $1,929,819 gold to Great Britain. The claims of United States citizens against Great Britain were all disallowed.

XVIII to XXV, relating to the fisheries, were terminated July 1, 1885, upon notice given in pursuance of a joint resolution of March 3, 1883 (22 Stats., at. L., p. 641). Articles XXII to XXV, inclusive, provided for the appointment of a commission to ascertain the amount of compensation to be awarded Great Britain for fishery privileges granted under Article XVIII. The commission met at Halifax, Nova Scotia, June 15, 1877, and November 23, 1877, awarded to Great Britain $5,500,000 in gold.

XXVI. Navigation of St. Lawrence, Yukon, Porcupine, and Stikine rivers.

XXVII. Reciprocal use of canals.

XXVIII. Navigation of Lake Michigan.

XXIX. Transshipment of merchandise.

XXX. Reciprocal transportation in vessels. This article was terminated July 1, 1885,

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upon notice given by the United States.

XXXI. Timber on river St. John.

XXXII and XXXIII relate to the fisheries and were terminated July 1, 1885.

XXXIV to XLII provide for the arbitration by the Emperor of Germany of the north-western water boundary.

XLIII. Ratification.

For an account of the arbitration under articles I–XI of this treaty, see Moore's History of International Arbitration, Vol. I, p. 495.

For an account of the arbitration under articles XII–XVII of this treaty, see *ibid.*, Vol. I, p. 683.

For an account of the arbitration under articles XVIII–XXV of this treaty, see *ibid.*, Vol. I, p. 703.

For an account of the arbitration under articles XXXIV–XLII of this treaty, see *ibid.*, Vol. I, p. 196.

For an account of the two "Alabama" Claims Courts, see *ibid.*, Vol. V, pp. 4639–4684.

The following five awards and protocols relate to the subject-matters of this treaty:

AWARD OF THE EMPEROR OF GERMANY UNDER THE XXXVIth ARTICLE GIVING THE ISLAND OF SAN JUAN TO THE UNITED STATES.

U. S. Tr. and Con. 1889, p. 494. U. S. Treaties in Force, 1899, p. 255.

PROTOCOL OF A CONFERENCE AT WASHINGTON, MARCH 10, 1873, RESPECTING THE NOTRHWEST WATER BOUNDARY.

U. S. Tr. and Con. 1889, p. 495. U. S. Treaties in Force, 1899, p. 256.

PROTOCOL DEFINING BOUNDARY LINE.

U. S. Tr. and Con. 1889, p. 497. U. S. Treaties in Force, 1899, p. 257.

PROTOCOL SETTLING WHEN ARTICLES 18 to 25, AND 30, SHOULD TAKE EFFECT TO PRINCE EDWARD'S ISLAND.

Signed June 7, 1873; proclaimed July 1, 1873, U. S. Tr. and Con. 1889, p. 498. VII Richardson's Messages, p. 225.

PROTOCAL SETTLING WHEN ARTICLES 18 TO 25, AND 30, SHOULD TAKE EFFECT AS TO NEWFOUNDLAND.

Signed May 24, 1874; proclaimed May 29, 1874. U. S. Tr. and Con. 1889, p. 499. VII Richardson's Messages, p. 273.

XXXI. ADDITIONAL ARTICLE TO TREATY OF MAY 8, 1871, RESPECTING MEETING PLACES FOR THE COMMISSION UNDER ARTICLE XII.

Concluded January 18, 1873; proclaimed April 15, 1873. 17 Stat. at L., p. 947. U. S. Tr. and Con. 1889, p. 494.

This article permitted the commission to hold its meetings at other places than Washington.

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XXXII. DECLARATION AFFORDING RECIPROCAL PROTECTION TO TRADE-MARKS.

Concluded October 24, 1877; proclaimed July 17, 1878. 20 Stat. at L., p. 703. U. S. Tr. and Con. 1889, p. 501. U. S. Treaties in Force, 1899, p. 258.

This treaty consists of a single article as to trade-mark protection.

XXXIII. MODUS VIVENDI.

Signed February 15, 1888. Sen. Ex. Doc. 113, 50th Cong., 1st Sess., March 5, 1888, pp. 125 and 141.

This *modus* gave the American fishermen certain privileges in Canadian waters until February 15, 1890.

XXXIV. EXTRADITION CONVENTION.

Concluded July 12, 1889; proclaimed March 25, 1890. 26 Stat. at L., p. 1508. U. S. Treaties in Force, 1899, p. 259.

The nine articles are:

I. Additional extraditable crimes.
II. Political crimes.
III. Prior offenses.
IV. Delivery of articles seized.
V. Crimes committed in other countries.
VI. Procedure.
VII. Escaped convicts.
VIII. No prior effect.
IX. Ratification; duration.

XXXV. MODUS VIVENDI.

Signed June 15, 1891; not ratified; proclaimed June 15, 1891. 27 St. at L., p. 980.

This agreement of four articles established a *modus vivendi* regarding the killing of fur seals in Behring Sea.

XXXVI. AGREEMENT.

Signed December 18, 1891. For. Rel. U. S. 1891, p. 605.

This agreement settles the text of seven articles to be inserted in the Behring Sea arbitration agreement.

XXXVII. CONVENTION RELATING TO FUR-SEALS IN BEHRING SEA.

Concluded February 29, 1892; proclaimed May 9, 1892. 27 Stat. at L., p. 947. U. S. Treaties in Force, 1899, p. 262, has the following note:

By this convention of fifteen articles the questions "concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to, the said Sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in, or habitually resorting to, the said waters," were submitted to a tribunal of seven arbitrators, appointed, two by the President of the United States, two by Her Britannic Majesty, one by the President of the French Republic,

one by the King of Italy, and one by the King of Sweden and Norway. It was provided by Article VI that

"In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

"1. What exclusive jurisdiction in the sea known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"3. Was the body of water now known as the Behring's Sea included in the phrase 'Pacific Ocean,' as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

"4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

"5. Has the United States anv right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"

The tribunal met at Paris, February 23, 1893, and delivered their decision August 15, 1893. The decision having been against the contention of the United States, a convention was concluded February 8, 1896, for the creation of a commission to assess the damages to be paid to the British claimants. For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. I, p. 755.

XXXVIII. Convention for the Renewal of the Existing Modus Vivendi in Behring Sea.

Concluded April 18, 1892; proclamed May 9, 1892. 27 Stat. at L., p. 952.

By this convention of seven articles both Governments prohibited the killing of fur seals by their respective citizens and subjects in the eastern part of Behring Sea during the pendency of the fur-seal arbitration.

XXXIX. Treaty for the Recovery of Deserters from Merchant Vessels.

Concluded June 3, 1892; proclaimed August 1, 1892. 27 Stat. at L., p. 961. U. S. Treaties in Force, 1899, p. 263.

The three articles are:

I. Arrests of deserting seamen.
II. Ratification.
III. Duration.

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XL. Convention for Delimiting Boundaries not Permanently Marked.

Concluded July 22, 1892; proclaimed August 26, 1892. 27 Stat. at L., p. 955. U. S. Treaties in Force, 1899, p. 264.

The three articles are:

I. Commissions to survey Alaskan boundary.
II. Commission to mark the boundary in Passamaquoddy Bay.
III. Ratification.

XLI. Convention Extending the Terms of the Alaskan Boundary Commissions.

Concluded February 3, 1894; proclaimed March 28, 1894. 28 Stat. at L., p. 1200. U. S. Treaties in Force, 1899, p. 266.

The two articles are:

I. Term of commissions extended. | II. Ratification.

XLII. Claims Convention.

Concluded February 8, 1896; proclaimed June 11, 1896. 29 Stat. at L., p. 844.

This convention provided for a commission to settle the claims presented by Great Britain for the losses sustained by the seizures of British vessels for fur sealing in the Behring Sea, under the provisions of the award of the Paris Tribunal of 1893. The two commissioners authorized by the convention held their first session at Victoria, British Columbia, November 25, 1896, and December 17, 1897, and rendered an award of $473,151.26 against the United States. (See U. S. Treaties in Force, 1899, p. 267.).

XLIII. Convention.

Concluded March 2, 1899; proclaimed August 6, 1900. 31 Stat. at L., p. 1939.

This convention provides for the tenure and disposition of real and personal property. It was acceded to by eighteen British Colonies, viz: Cape, Fiji, Jamaica, Bahamas, Trinidad, Barbadoes, St. Vincent, St. Lucia, Falkland Islands, St. Helena, Sierra Leone, Gambia, Cyprus, Ceylon, Hongkong, Straits Settlements, British Honduras, Grenada.

The seven articles are:

I. Three years aliens to sell inherited property.
II. Disposition of personal property.
III. Notice of death to consul who represents heirs.
IV. Adhesion of British colonies and of foreign territory of United States.
V. Most favored nation rights.
VI. Duration.
VII. Ratification.

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XLIV. Modus Vivendi.

Concluded October 20, 1899. For. Rel. U. S. 1899, p. 330.

This *modus* establishes a provisional boundary between Alaska and the Dominion of Canada.

XLV. Ship Canal Convention.

(The Hay-Pauncefote Convention.)

Signed Nov. 18, 1901. At the time of going to press this convention had not been ratified or proclaimed. Its definite form, if ratified, must be sought in official publications issued after January 1, 1902.

The text of this convention is :

The United States of America and his Majesty, Edward VII of the United Kingdom of Great Britian and Ireland and of the British Dominions beyond the seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the convention of the 19th of April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States without impairing the "general principle" of neutralization established in Article VIII of that convention, have for that purpose appointed as their plenipotentiaries :

The President of the United States, John Hay, Secretary of State of the United States of America; and his Majesty Edward VII of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, King, and Emperor of India, the Right Hon. Lord Pauncefote, G. C. B., G. C. M. G., his Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following articles :

ARTICLE I.

The high contracting parties agree that the present treaty shall supersede the aforementioned convention of the 19th of April, 1850.

ARTICLE II.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations; or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

ARTICLE III.

The United States adopts as the basis of the neutralization of such

ship canal, the following rules substantially as embodied in the convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised, nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service. Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hinderence of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be parts thereof for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

ARTICLE IV.

It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

ARTICLE V.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by his Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective plenipotentiaries have signed this

treaty and hereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of our Lord One Thousand Nine Hundred and One.

JOHN HAY. [Seal.]
PAUNCEFOTE. [Seal.]

[Note.—At the time of publishing this book (December, 1901) there are several reciprocity treaties with British possessions pending ratification in the United States Senate.]

Proclamations.

The following proclamations concern the relations of the United States with Great Britain:

1. By President Jefferson, ordering certain British war-vessels to leave the waters of the United States, and forbidding any war-vessels under the command of certain officers named from entering those waters; May 3, 1806. I Richardson's Messages, p. 402.

2. By President Jefferson, ordering all British war vessels to leave the waters of the United States and forbidding any of them to enter such waters except under stress of weather or to bring despatches; July 2, 1807. I Richardson's Messages, p. 422.

3. By President Madison, under the Act of Congress of March 1, 1809 (2 Stat. at L., p. 528), renewing trade with Great Britain and relieving the embargo on it; April 19, 1809. I Richardson's Messages, p. 472.

4. By President Madison, revoking the last preceding proclamation; August 9, 1809. I Richardson's Messages, p. 473.

5. By President Madison, calling on all citizens to deport themselves properly during the war declared by Congress with Great Britain; June 19, 1812. I Richardson's Messages, p. 512.

6. By President Madison, declaring the blockade by the British ineffectual, and forbidding all United States war vessels or privateers from interfering with foreign commerce with neutrals; June 29, 1814. I Richardson's Messages, p. 543.

7. By President Madison, calling attention to the burning of Washington by British naval forces, and to the threats to burn other coast towns, and calling on all officers and citizens to resist such attacks; September 1, 1814. I Richardson's Messages, p. 545.

8. By President Monroe, under the Act of Congress of March 3, 1817 (3 Stat. at L., p. 361), removing the prohibition on the importation of plaster of paris in foreign vessels, so far as the same applied to Nova Scotia; April 23, 1818. II Richardson's Messages, p. 34.

9. By President Monroe under the act last mentioned, removing the prohibition as to the Province of New Brunswick; July 4, 1818. II Richardson's Messages, p. 36.

10. By President Monroe, under the Act of Congress of May 6, 1822, (3 Stat. at L., p. 681), opening the ports of the United States to vessels of Great Britain for trade between such ports and certain designated British islands and colonies, until the end of the next session of Congress; August 24, 1822. II Richardson's Messages, p. 184.

11. By President Adams, under the Act of Congress of March 1, 1823

(3 Stat. at L., p. 740), prohibiting trade and intercourse with certain British colonial ports; March 17, 1827. II Richardson's Messages, p. 375.

12. By President Jackson, under the Act of Congress of May 29, 1830 (4 Stat. at L., p. 419), opening the ports of the United States to British vessels coming from certain British possessions, and declaring certain Acts of Congress repealed; October 5, 1830. II Richardson's Messages, p. 497.

13. By President Pierce, under the Act of Congress of August 5, 1854 (10 Stat. at L., p. 587), admitting certain articles, imported from Canada and the Provinces, free of duty; March 16, 1855. V Richardson's Messages, p. 325.

14. By President Pierce, under the last mentioned act, admitting certain articles, imported from Newfoundland, free of duty; December 12, 1855. V Richardson's Messages, p. 389.

15. By President Pierce, three separate proclamations revoking the powers of the British consuls at New York, Philadelphia, and Cincinnati, respectively; each dated May 28, 1856. V Richardson's Messages, pp. 391, 392, 393.

16. By President Grant, under the Act of Congress of June 23, 1874 (18 Stat. at L., p. 245), extending the duration of the "Court of Commissioners of Alabama Claims" for six months from July 22, 1875; June 2, 1875. VII Richardson's Messages, p. 324.

17. By President Arthur, under the provisions of Article XXXIII of the treaty of 1871 with Great Britain, terminating Articles XVIII to XXV, XXX and XXXII, all inclusive of that treaty; January 31, 1885. VIII Richardson's Messages, p. 280.

18. By President Arthur, under the Act of Congress of June 26, 1884 (23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from the Province of Ontario or the island of Montserrat; January 31, 1885. VIII Richardson's Messages, p. 284.

19. By President Cleveland, under the Act of Congress of June 26, 1884 (23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from the island of Trinidad; April 7, 1885. VIII Richardson's Messages, p. 304.

20. By President Benjamin Harrison, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Great Britain and the British possessions; July 1, 1891. IX Richardson's Messages, p. 147.

21. By President Benjamin Harrison, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), suspending the tonnage duty on vessels from Tobago, except vessels of countries which impose discriminating duties on United States vessels; December 2, 1891. IX Richardson's Messages, p. 163.

22. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Great Britain in admitting certain articles free of duty in certain British colonies, and thus obtaining the reciprocity advantages under sec. 3 of said act; February 1, 1892. IX Richardson's Messages, p. 253.

GREAT BRITAIN.

23. By President Benjamin Harrison, under the Act of Congress of July 26, 1892 (27 Stat. at L., p. 267), suspending the right of free passage through the St. Mary's Fall Canals of cargoes in transit to Canadian ports; August 18, 1892. IX Richardson's Messages, p. 290.

24. By President Benjamin Harrison, suspending the foregoing proclamation; February 21, 1893. IX Richardson's Messages, p. 377.

25. By President Cleveland, republishing Articles I, II and III of the convention of 1892 with Great Britain; April 8, 1893. IX Richardson's Messages, p. 394.

26. By President Cleveland, under the Act of Congress of May 24, 1890 (26 Stat. at L., p. 120), permitting Canadian vessels to assist wrecked vessels in United States waters; July 17, 1893. IX Richardson's Messages, p. 396.

27. By President Cleveland, publishing the Act of Congress of April 6, 1894 (28 Stat. at L., p. 52), giving effect to the award of the Tribunal of Arbitration concerning fur seals; April 9, 1894. IX Richardson's Messages, p. 494.

28. By President Cleveland, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), and of April 4, 1888 (25 Stat. at L., p. 80), suspending the tonnage duties on vessels from Grenada, except vessels of countries which impose discriminating duties on United States vessels; May 2, 1894. IX Richardson's Messages, p. 498.

29. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Great Britain, Canada and British Guiana, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

30. By President McKinley, revoking the proclamation of December 2, 1891, suspending tonnage duties on vessels from the island of Tobago; March 13, 1899. 30 Stat. at L., p. 1790.

31. By President McKinley, revoking the proclamation of April 7, 1885, suspending tonnage duties on vessels from the island of Trinidad; March 13, 1899. 30 Stat. at L., p. 1791.

Diplomatic Correspondence.

In April–June, 1885, a *modus vivendi* with Great Britain as to the North Atlantic Fisheries was reached by diplomatic correspondence. For. Rel. U. S. 1885, pp. 460, *et seq.*

GREECE.

Treaty and Protocol.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded December 22, 1837; proclaimed August 30, 1838. 8 Stat. at L., p. 498; in French and English. U. S. Tr. and Con. 1889, p. 502; U. S. Treaties in Force, 1899, p. 268.

The eighteen articles are:

I. Freedom of commerce. | II. Tonnage duties, etc.

GREECE.

III. Imports.
IV. Exports.
V. Coasting trade.
VI. Government purchases.
VII. Navigation duties.
VIII. No discriminating prohibitions.
IX. Transit, bounties, and drawbacks.
X. Vessels entering without unloading.
XI. Unloading part of cargo.
XII. Consular officers and privileges.
XIII. Deserters from ships.
XIV. Shipwrecks.
XV. Quarantine.
XVI. Blockades.
XVII. Duration.
XVIII. Ratification.

II. PROTOCOL.

Signed February 10, 1890. For. Rel. U. S. 1890, p. 510.

This agreement extends the first article of the treaty of 1837 to joint-stock companies and other associations.

Proclamation.

The following proclamation concerns the relations of the United States with Greece:

By President Van Buren under the Act of Congress of July 13, 1832 (4 Stat. at L., p. 578), abolishing tonnage duties on vessels of Greece; June 14, 1837. III Richardson's Messages, p. 322.

GUATEMALA.

Treaty and Protocols.

I. TREATY OF PEACE, FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded March 3, 1849; proclaimed July 28, 1852. 10 Stat. at L., Treaties p. 1; in Spanish and English. U. S. Tr. and Con. 1889, p. 508.

This treaty of thirty-three articles was terminated by notice November 4, 1874. (See U. S. Treaties in Force, 1899, p. 275.)

II. PROTOCOL.

Signed February 23, 1900. Published in leaflet by the State Department.

This agreement submits the claim of an American citizen against Guatemala to an arbitrator.

III. SUPPLEMENTAL PROTOCOL.

Signed May 10, 1900. Published in leaflet by the State Department.

Supplements the foregoing protocol.

Proclamations.

The following proclamations concern the relations of the United States with Guatemala:

GUATEMALA.

1. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Guatemala in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; May 18, 1892. IX Richardson's Messages, p. 281.

2. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Guatemala, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

HAITI.

Treaty and Protocols.

I. TREATY OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded November 3, 1864; proclaimed July 6, 1865. 13 Stat. at L., p. 711; in French and English. U. S. Tr. and Con. 1889, p. 551. U. S. Treaties in Force, 1899, p. 276.

The forty-three articles are:

I. Amity.
II. Most favored nation treatment.
III. Immunity in case of war.
IV. Confiscations prohibited.
V. Personal exemptions of citizens.
VI. Trade privileges.
VII. Privacy of books and papers.
VIII. Religious freedom.
IX. Disposal of personal property.
X. Imports.
XI. Exports.
XII. Coasting trade.
XIII. Equality of duties and prohibitions.
XIV. Discriminating duties.
XV. Rights of asylum.
XVI. Shipwrecks.
XVII. Neutrality of vessels.
XVIII. Blockades.
XIX. Free ships, free goods.
XX. Contraband articles.
XXI. Goods not contraband.
XXII. Merchant ships.
XXIII. Papers of neutral vessels.
XXIV. Right of search.
XXV. Ships under convoy.
XXVI. Captures.
XXVII. Care of property captured.
XXVIII. Prize courts.
XXIX. Entry of captured vessels.
XXX. Restriction on foreign privateers.
XXXI. Letters of marque forbidden.
XXXII. Diplomatic privileges.
XXXIII. Consular service.
XXXIV. Exequaturs.
XXXV. Consular privileges.
XXXVI. Deserters from ships.
XXXVII. Consular convention to be concluded.
XXXVIII. Extradition of fugitives from justice.
XXXIX. Extraditable crimes.
XL. Surrender; expenses.
XLI. Political offenses.
XLII. Duration.
XLIII. Ratification.

HAITI.

II. CLAIMS AGREEMENT.

Signed May 24, 1884. 23 Stat. at L., p. 785; in French and English.

This agreement of six articles refers to claims against the Haitian government to an arbitrator. For an account of the arbitration under this agreement, see Moore's History of International Arbitration. Vol. II, p. 1749.

III. PROTOCOL.

Signed March 20, 1885. Moore's History of International Arbitration, Vol. V, p. 4769.

Extends the time of the arbitrator under the preceding agreement to file his award.

IV. CLAIMS PROTOCOL.

Signed May 24, 1888. Moore's History of International Arbitration, Vol. V, p. 4770.

This protocol of five articles submits a private claim against Haiti to a referee. For an account of the arbitration under this protocol, see Moore's History of International Arbitration, Vol. II, p. 1807.

V. PROTOCOL.

Signed October 18, 1899. Published in leaflet by State Department.

This agreement of eight articles submits the claim of an American citizen against Haiti to an arbitrator.

Proclamation.

The following proclamation concerns the relations of the United States with Haiti:

By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Haiti in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; March 15, 1892. IX Richardson's Messages, p. 267.

Diplomatic Correspondence.

In January–March, 1885, an arrangement was made by diplomatic correspondence to refer the claim of two American citizens against Haiti to a Commission of four. For. Rel. U. S. 1885, pp. 500 *et seq.* For an account of the proceedidgs of this Commission, see Moore's History of International Arbitration, Vol. II, p. 1859.

HANOVER.

Hanover was conquered and merged into Prussia in 1866, and is now included in the German Empire.

HANOVER.

Treaties and Convention.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded May 20, 1840; proclaimed January 2, 1841. 8 Stat. at L., 552; in French and English. U. S. Tr. and Con. 1889, p. 518.

This treaty, consisting of ten articles, was superseded by the Treaty of 1846. (See U. S. Treaties in Force, 1899, p. 288.)

II. TREATY OF COMMERCE AND NAVIGATION.

Concluded June 10, 1846; proclaimed April 24, 1847. 9 Stat. at L., Treaties p. 55; in German and English. U. S. Tr. and Con. 1889, p. 523.

This treaty of thirteen articles terminated on the merging of the country into the Kingdom of Prussia. (See U. S. Treaties in Force, 1899, p. 288.)

III. EXTRADITION TREATY.

Concluded January 18, 1855; proclaimed May 5, 1855. U. S. Tr. and Con. 1889, p. 528.

This treaty of six articles terminated in 1866 when Hanover was merged into the Kingdom of Prussia. (See U. S. Treaties in Force, 1899, p. 288.)

IV. CONVENTION ABOLISHING STATE OR BRUNSHAUSEN DUES.

Concluded November 6, 1861; proclaimed June 17, 1862. 12 Stat. at L., p. 1187. U. S. Tr. and Con. 1889, p. 530.

This treaty, consisting of seven articles, terminated on the incorporation of the Kingdom into Prussia. (See U. S. Treaties in Force, 1899, p. 288.)

Proclamation.

The following proclamation concerns the relations of the United States with Hanover:

By President Adams, under the Act of Congress of January 7, 1824 (4 Stat. at L., p. 2), removing discriminating duties of tonnage and impost from vessels and merchandise of Hanover; July 1, 1828. II Richardson's Messages, p. 404.

HANSEATIC REPUBLICS.

(BREMEN, HAMBURG AND LUBECK.)

The Hanseatic Republics were incorporated into the North German Union July 1, 1867. (See also German Empire.)

Conventions.

I. CONVENTION OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded December 20, 1827; proclaimed June 2, 1828. 8 Stat. at L., p. 366; in French and English. U. S. Tr. and Con. 1889, p. 533. U. S. Treaties in Force, 1899, p. 289.

HANSEATIC REPUBLICS.

The eleven articles are:

I. Equality of duties.
II. Import and export duties.
III. Government purchases.
IV. Proof of Hanseatic vessels.
V. Rights to trade.
VI. Commercial privileges.
VII. Property rights.
VIII. Special protection to persons and property.
IX. Most favored nation privileges.
X. Duration.
XI. Ratification.

II. ADDITIONAL ARTICLE TO CONVENTION OF 1827.

Concluded June 4, 1828; proclaimed July 29, 1829. 8 Stat. at L., p. 386; in French and English. U. S. Tr. and Con. 1889, p. 537.

This article relating to the arrest of deserters at request of consuls was superseded by the consular convention with the German Empire. (U. S. Treaties in Force, 1899, p. 293.)

III. CONSULAR CONVENTION.

Concluded April 30, 1853; proclaimed June 6, 1853. 10 Stat. at L., Treaties p. 95; in German and English. U. S. Tr. and Con. 1889, p. 538.

This contention of three articles was superseded by the general consular convention of the German Empire of 1871. (U. S. Treaties in Force, 1899, p. 293.)

Proclamations.

The following proclamations concern the relations of the United States with the Hanseatic Republics:

1. By President Monroe, under the Act of Congress of March 3, 1815, (3 Stat. at L., p. 224), repealing discriminating duties on vessels and goods imported from Bremen; July 24, 1818. II Richardson's Messages, p. 37.

2. By President Monroe, under the act last mentioned, repealing the same duties on vessels and goods imported from Hamburg; August 1, 1818. II Richardson's Messages, p. 38.

3. By President Monroe, under the act last mentioned, repealing the same duties on vessels and goods imported from Lubeck; May 4, 1820. II Richardson's Messages, p. 73.

HAWAIIAN ISLANDS.

The cession of the Hawaiian Islands to the United States having been accepted by the resolution approved by the President July 7, 1898, (30 Stat. at L., p. 750,) the treaties with that country terminated upon the formation of the government for the islands. (See U. S. Treaties in Force, 1899, p. 294.)

Treaties and Protocol.

I. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION AND EXTRADITION.

Concluded December 20, 1849; proclaimed November 9, 1850. 9 Stat. at L., Treaties p. 178. U. S. Tr. and Con. 1889, p. 540.

HAWAIIAN ISLANDS.

II. TREATY OF RECIPROCITY.

Concluded January 30, 1875; proclaimed June 3, 1875. 19 Stat. at L., Treaties p. 69. U. S. Tr. and Con. 1889, p. 546.

By this treaty of six articles certain specified articles were admitted free of duty into the United States and the Hawaiian Islands respectively.

III. PROTOCOL.

Signed and proclaimed September 9, 1876. U. S. Tr. and Con. 1889, p. 549. VII Richardson's Messages, p. 394.

Declaring that the last treaty shall go into effect on the date of this protocol.

IV. TREATY OF RECIPROCITY.

Concluded December 6, 1884; proclaimed November 9, 1887. 25 Stat. at L., p. 1399. U. S. Tr. and Con. 1889, p. 1187.

By this treaty the Reciprocity Treaty of 1875 was extended for a further term of seven years and there was granted to the United States the exclusive right to establish a coaling station at Pearl River Harbor.

Proclamation.

The following proclamation concerns the relations of the United States with the Hawaiian Islands:

By President Johnson, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of the Hawaiian Islands; January 29, 1867. VI Richardson's Messages, p. 515.

HESSE.

(See German Empire, North German Confederation and Prussia.)

Conventions.

I. CONVENTION ABOLISHING DROIT D'AUBAINE AND TAXES ON EMIGRATION.

Concluded March 26, 1844; proclaimed May 8, 1845. 9. Stat. at L., Treaties p. 1; in French and English. U. S. Tr. and Con. 1889, p. 562. U. S. Treaties in Force, 1899, p. 295.

The six articles are:

I. Droit d'aubaine, etc., abolished.
II. Disposition of real estate.
III. Disposition of personal property.
IV. Rights of absent heirs.
V. Inheritance disputes.
VI. Ratification.

HESSE.

II. NATURALIZATION CONVENTION.

Concluded August 1, 1868; proclaimed August 31, 1869. 16 Stat. at L., p. 743; in German and English. U. S. Tr. and Con. 1889, p. 563. U. S. Treaties in Force, 1899, p. 297.

The six articles are:

I. Naturalization recognized.
II. Prior offenses.
III. Extradition.
IV. Renunciation of acquired citizenship.
V. Duration.
VI. Ratification.

HONDURAS.

Treaty.

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 4, 1864; proclaimed May 30, 1865. 13 Stat. at L., p. 699; in Spanish and English. U. S. Tr. and Con. 1889, p. 566. U. S. Treaties in Force, 1899, p. 299.

The fifteen articles are:

I. Amity.
II. Freedom of commerce; coasting trade.
III. Most favored nation privileges.
IV. Equality of import and export duties.
V. Shipping dues.
VI. Reciprocal treatment of vessels.
VII. Protection of property, etc.
VIII. Disposal of property, etc.
IX. Exemptions from military service, loans, etc.
X. Diplomatic and consular privileges.
XI. Protection in case of war.
XII. General liberties.
XIII. Duration of Articles IV, V, and VI.
XIV. Neutrality of Honduras Interoceanic Railway.
XV. Ratification.

Proclamations.

The following proclamations concern the relations of the United States with Honduras:

1. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Honduras in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; April 30, 1892. IX Richardson's Messages, p. 279.

2. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Honduras, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

ITALY.

Treaties and Conventions.

I. Consular Convention.

Concluded February 8, 1868; proclaimed February 23, 1869. 15 Stat. at L., p. 605; in Italian and English. U. S. Tr. and Con. 1889, p. 573.

This convention, consisting of seventeen articles, was superseded by the Convention of 1878 upon the exchange of ratifications September 17, 1878. (See U. S. Treaties in Force, 1899, p. 306.)

II. Extradition Convention.

Concluded March 23, 1868; proclaimed September 30, 1868. 15 Stat. at L., p. 629; in Italian and English. U. S. Tr. and Con. 1889, p. 578. U. S. Treaties in Force, 1899, p. 306.

The seven articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Political offences.
IV. Persons under arrest.
V. Procedure.
VI. Expenses.
VII. Duration; ratification.

III. Consular Convention.

Concluded January 21, 1869; proclaimed May 11, 1869. 16 Stat. at L., p. 769; in Italian and English. U. S. Tr. and Con. 1889, p. 577.

This was an article extending the time for the exchange of the ratifications of the Consular Convention of 1868.

IV. Convention Additional to Extradition Convention, 1868.

Concluded January 21, 1869; proclaimed May 11, 1869. 16 Stat. at L., p. 767; in Italian and English. U. S. Tr. and Con. 1889, p. 580. U. S. Treaties in Force, 1899, p. 309.

This treaty consists of one article relating to the crime of embezzlement.

V. Treaty of Commerce and Navigation.

Concluded February 26, 1871; proclaimed November 23, 1871. 17 Stat. at L., p. 845; in Italian and English. U. S. Tr. and Con. 1889, p. 581. U. S. Treaties in Force, 1899, p. 309.

The twenty-six articles are:

I. Freedom of commerce and navigation.
II. Liberty to trade and travel.
III. Rights of person and property; exemptions.
IV. Embargo.
V. No shipping discriminations.
VI. No discriminations of imports and exports.
VII. Shipping privileges.
VIII. Exemptions from shipping dues, etc.
IX. Shipwrecks.
X. Completing crews.
XI. Piratical captures.

ITALY.

XII. Exemptions in war.
XIII. Blockade.
XIV. Regulation of blockades.
XV. Contraband articles.
XVI. Rights of neutrals; free ships, free goods.
XVII. Proof of nationality of vessels.
XVIII. Right of search.
XIX. Vessels under convoy.
XX. Conduct of commanders of war vessels.
XXI. Protection in case of war.
XXII. Disposal of property.
XXIII. Legal rights.
XXIV. Most favored nation privileges.
XXV. Duration.
XXVI. Ratification.

VI. CONSULAR CONVENTION.

Concluded May 8, 1878; proclaimed September 27, 1878. 20 Stat at L., p. 725, in Italian and English. U. S. Tr. and Con. 1889, p. 588; U. S. Treaties in Force, 1899, p. 317.

The eighteen articles are:

I. Consular recognition.
II. Exequaturs.
III. Exemptions.
IV. Status in legal proceedings.
V. Arms and flags.
VI. Archives.
VII. Vacancies.
VIII. Vice-consuls and agents.
IX. Dealings with officials.
X. General powers.
XI. Shipping disputes.
XII. Disputes between passengers and officers of vessels.
XIII. Deserters from ships.
XIV. Damages at sea.
XV. Shipwrecks.
XVI. Death of citizens.
XVII. Most favored nation privileges.
XVIII. Duration; ratification.

VII. CONVENTION SUPPLEMENTAL TO CONSULAR CONVENTION.

Concluded February 24, 1881; proclaimed June 29, 1881. 22 Stat. at L., p. 831; in Italian and English. U. S. Tr. and Con. 1889, p. 593. U. S. Treaties in Force, 1899, p. 322.

The two articles are:

I. Shipping disputes; substitute for Article XI.
II. Ratification and effect.

VIII. TRADE-MARK DECLARATION.

Signed June 1, 1882; proclaimed March 19, 1884. U. S. Tr. and Con., 1889, p. 595. U. S. Treaties in Force, 1899, p. 323.

This Declaration consists of a single article; at the foot of the text as published in the treaty volumes there is the following note:

As the act of Congress, entitled "An act to authorize the registration of trade-marks and protect the same," approved March 3, 1881 (21 Stats. at L., p. 502), gives the right of trade-mark registry to subjects of any foreign country which by law admits the like right for citizens of the United States, this Declaration is held to be an establishment of the fact that such reciprocal privilege exists, and is therefore effective from June 1, 1882, the date of its signature.

ITALY.

IX. CONVENTION ADDITIONAL TO EXTRADITION CONVENTION.

Concluded June 11, 1884; proclaimed April 24, 1885. 24 Stat. at L., p. 1001; in Italian and English. U. S. Tr. and Con. 1889, p. 595. U. S. Treaties in Force, 1899, p. 324.

The three articles are:

I. Kidnapping added to extraditable crimes.
II. Preliminary detention.
III. Effect; ratification.

X. COMMERCIAL AGREEMENT.

Signed February 8, 1900; proclaimed July 18, 1900. 31 Stat at L., p. 1979.

A reciprocity agreement of three articles under the tariff act of 1897. 30 Stat. at L., p. 151, 203.

Proclamations.

The following proclamations concern the relations of the United States with Italy:

1. By President Grant, under the Act of Congress of June 11, 1864 (13 Stat. at L., p. 121), establishing Italian consular courts under said act; February 10, 1870. VII Richardson's Messages, p. 84.

2. By President Benjamin Harrison, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Italy; October 31, 1892. IX Richardson's Messages, p. 301.

JAPAN.

Treaties and Conventions.

I. TREATY OF PEACE, AMITY AND COMMERCE.

Concluded March 31, 1854, by Commodore Perry; proclaimed June 22, 1855. 11 Stat. at L., p. 597. U. S. Tr. and Con. 1889, p. 597. U. S. Treaties in Force, 1899, p. 326. (Articles III, IV, and V.)

The twelve articles are:

I. Peace and amity.
II. Opening of Simoda and Hakodade.
III. Shipwrecks.
IV. Treatment of shipwrecked persons.
V. Shipwrecked persons at Simoda and Hakodade.
VI. Business.
VII. Trade.
VIII. Supplies to vessels.
IX. Most favored nation privileges.
X. Open ports.
XI. Consuls.
XII. Ratification.

II. COMMERCIAL AND CONSULAR TREATY.

Concluded June 17, 1857; proclaimed June 30, 1858. 11 Stat. at L., p. 723. U. S. Tr. and Con. 1889, p. 599.

JAPAN.

This treaty of nine articles was superseded by the Treaty of 1858. (See U. S. Treaties in Force, 1899, p. 327.)

III. TREATY OF COMMERCE AND NAVIGATION.

Concluded July 29, 1858; proclaimed May 23, 1860. 12 Stat. at L., p. 1051; in Dutch and English. U. S. Tr. and Con. 1889, p. 601.

This treaty was superseded July 17, 1899, when the Treaty of November 22, 1894 went into effect. (U. S. Treaties in Force, 1899, p. 327.)

IV. CONVENTION FOR THE REDUCTION OF IMPORT DUTIES.

Concluded January 28, 1864; proclaimed April 9, 1866. 14 Stat. at L., p. 655. U. S. Tr. and Con. 1889, p. 610.

This convention of four articles was superseded by the Convention of 1866. (See U. S. Treaties in Force, 1899, p. 336.)

V. CONVENTION FOR THE PAYMENT OF THE SIMONOSEKI INDEMNITIES.

Concluded October 22, 1864; proclaimed April 9, 1866. 14 Stat. at L., p. 665. U. S. Tr. and Con. 1889, p. 611.

This convention, between Japan and the United States, Great Britain, France, and The Netherlands, provided for the payment of $3,000,000 to the four powers.

VI. CONVENTION ESTABLISHING TARIFF OF DUTIES BETWEEN JAPAN AND THE UNITED STATES, GREAT BRITAIN, FRANCE, AND THE NETHERLANDS.

Concluded June 25, 1866; ratification advised by the Senate June 17, 1868. U. S. Tr. and Con. 1889, p. 612.

This treaty was not proclaimed and was superseded July 17, 1899, by the Treaty of November 22, 1894. (See U. S. Treaties in Force, 1899, p. 336.)

VII. COMMERCIAL CONVENTION.

Concluded July 25, 1878; proclaimed April 8, 1879. 20 Stat. at L., p. 797. U. S. Tr. and Con. 1889, p. 621.

It was provided by Article X that this convention should take effect when existing treaties with other powers had been revised, and on July 17, 1899, it was superseded by the treaty of November 22, 1894. (See U. S. Treaties in Force, 1899, p. 345.)

VIII. CONVENTION FOR REIMBURSING SHIPWRECK EXPENSES.

Concluded May 17, 1880; proclaimed October 3, 1881. 22 Stat. at L., p. 815. U. S. Tr. and Con. 1889, p. 624. U. S. Treaties in Force, 1899, p. 348.

This treaty consists of a single article.

IX. EXTRADITION TREATY.

Concluded April 29, 1886; proclaimed November 3, 1886. 24 Stat. at L., p. 1015. U. S. Tr. and Con. 1889, p. 625. U. S. Treaties in Force, 1899, p. 349.

JAPAN.

The nine articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Persons under arrest.
IV. Political offenses.
V. Procedure.
VI. Temporary detention.
VII. Delivery of citizens.
VIII. Expenses.
IX. Duration; ratification.

X. TREATY OF COMMERCE AND NAVIGATION.

Concluded November 22, 1894; proclaimed March 21, 1895. 29 Stat. at L., p. 848. U. S. Treaties in Force, 1899, p. 362.

This treaty which took effect on July 17, 1899, consists of twenty articles as follows:

I. Mutual freedom of trade, travel, etc.; taxes; exemptions.
II. Commerce and navigation.
III. Inviolability of dwellings, etc.
IV. Import duties.
V. Export duties.
VI. Transit dues, etc.
VII. Equality of shipping.
VIII. Tonnage, etc., dues.
IX. Port regulations.
X. Coasting trade.
XI. Vessels in distress, shipwrecks, etc.
XII. Nationality of vessels.
XIII. Deserters from ships.
XIV. Favored nation privileges.
XV. Consular officers.
XVI. Patents, trade-marks, and designs.
XVII. Abolition of foreign settlements in Japan.
XVIII. Foreign treaties superseded.
XIX. Date of taking effect.
XX. Ratification.
Protocol.

XI. PROTOCOL.

Concluded November 22, 1894; proclaimed March 21, 1895. 29 Stat. at L., p. 855. U. S. Treaties in Force, 1899, p. 359.

This protocol was never ratified by the Senate. It contains three articles:

I. Tariff in Japan. Prohibited imports.
II. Extension of passport system.
III. Ratification.

XII. CONVENTION AS TO PATENTS, TRADE-MARKS, AND DESIGNS.

Concluded January 13, 1897; proclaimed March 9, 1897. 29 Stat. at L., p. 860. U. S. Treaties in Force, 1899, p. 360.

Fixing time for Article XXI of treaty of 1894 to take effect.

Proclamations.

The following proclamations concern the relations of the United States with Japan:

1. By President Johnson, calling attention to a notification by United States legation in Japan to American vessels not to approach cer-

tain parts of the Japanese coasts during the existence of civil war there; January 12, 1867. VI Richardson's Messages, p. 514.

2. By President Grant, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), abolishing discriminating duties on Japanese vessels, or the merchandise they carry, in American ports; September 4, 1872. VII Richardson's Messages, p. 177.

KONGO.

Declaration and Treaty.

I. DECLARATION.

Signed April 22, 1884. 23 Stat. at L., p. 781.

This declaration, signed by the Secretary of State, with the advice and consent of the Senate, approves the humane and benevolent purposes of the International Association of the Kongo, and agrees to order the officers of the United States to recognize its flag as that of a friendly government.

II. TREATY OF AMITY, COMMERCE AND NAVIGATION.

Concluded January 24, 1891, with the King of the Belgians as Sovereign of the Independent State of the Kongo; proclaimed April 2, 1892. 27 Stat. at L., p. 926; in French and English. U. S. Treaties in Force, 1899, p. 361.

The fifteen articles are:

I. Freedom of commerce and navigation.
II. Property rights.
III. Exemptions of service.
IV. Religious freedom.
V. Consular officers.
VI. Shipping privileges.
VII. Transportation.
VIII. Prohibitions.
IX. (Not agreed to.)
X. Import duties.
XI. Most favored nation privileges.
XII. Other privileges.
XIII. Arbitration.
XIV. Conditions.
XV. Ratification.
Senate resolution of ratification.

KOREA.

Treaty.

TREATY OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded May 22, 1882; proclaimed June 4, 1883. 23 Stat. at L., p. 720. U. S. Tr. and Con. 1899, p. 216. U. S. Treaties in Force, 1899, p. 367.

The fourteen articles are:

I. Amity.
II. Diplomatic and consular privileges.
III. Asylum; shipwrecks.
IV. Protection in Korea; exterritoriality.
V. Shipping dues; imports.
VI. Residence and travel.

KOREA.

VII. Opium traffic.
VIII. Exportation of breadstuffs and ginseng prohibited.
IX. Arms and ammunition.
X. Employing natives, etc.
XI. Privileges to students.
XII. Duration.
XIII. Language of correspondence.
XIV. Most favored nation privileges; ratification.

(See qualified Ratification by the Senate in U. S. Treaties in Force, 1899, p. 372.)

LEW CHEW.

Convention.

COMPACT OF FRIENDSHIP AND COMMERCE.

Concluded July 11, 1854; proclaimed March 9, 1855. 10 Stat. at L., Treaties, p. 211. U. S. Tr. and Con. 1889, p. 629. U. S. Treaties in Force, 1899, p. 373.

LIBERIA.

Treaty.

TREATY OF COMMERCE AND NAVIGATION.

Concluded October 21, 1862; proclaimed March 18, 1863. 12 Stat. at L., p. 1245. U. S. Tr. and Con. 1889, p. 631. U. S. Treaties in Force, 1899, p. 375.

The nine articles are:

I. Amity.
II. Freedom of commerce.
III. No discrimination in vessels.
IV. Imports and exports.
V. Shipwrecks and salvage.
VI. Most favored nation privileges.
VII. Consuls.
VIII. Noninterference in Liberia.
IX. Ratification.

LUBEC.

(See Hanseatic Republics.)

LUXEMBURG.

Convention.

EXTRADITION CONVENTION.

Concluded October 29, 1883; proclaimed August 12, 1884. 23 Stat. at L., p. 808; in French and English. U. S. Tr. and Con. 1889, p. 634. U. S. Treaties in Force, 1899, p. 378.

The eleven articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Trials of persons surrendered.

IV. Political offenses.
V. Delivery of citizens.
VI. Persons under arrest.
VII. Procedure.
VIII. Expenses.
IX. Limitations.
X. Articles in possession of accused.
XI. Duration; ratification.

MADAGASCAR.

Treaties.

Madagascar having become a colony of France, the treaties of 1867 and 1881 have become obsolete.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded February 14, 1867; proclaimed October 1, 1868. 15 Stat. at L., p. 491. U. S. Tr. and Con. 1889, p. 638.

This treaty, consisting of seven articles, was superseded by the Treaty of 1881. (See U. S. Treaties in Force, 1899, p. 382.)

II. TREATY OF FRIENDSHIP AND COMMERCE.

Concluded May 13, 1881; proclaimed March 13, 1883. 22 Stat. at L., p. 952. U. S. Tr. and Con. 1889, p. 641.

This treaty, consisting of twelve articles, became obsolete when the sovereignty of France was extended over Madagascar. (See U. S. Treaties in Force, 1899, p. 382.)

MASKAT.

(See Muscat.)

MECKLENBURG-SCHWERIN.

(See German Empire, North German Union and Prussia.)

Treaty and Declaration.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded December 9, 1847; proclaimed August 2, 1848. 9 Stat. at L., Treaties p. 67; in German and English. U. S. Tr. and Con. 1889, p. 653. U. S. Treaties in Force, 1899, p. 383.

The eleven articles are:

I. Freedom of commerce.
II. Coasting trade.
III. No preference to vessels importing.
IV. Shipwrecks.
V. Extent of shipping privileges.
VI. Duties on imports and exports.
VII. Most favored nation commercial privileges.
VIII. Duties on cotton, rice, tobacco and whale oil.

MECKLENBURG-SCHWERIN.

IX. Consular officers and functions.
X. Trade and property rights.
XI. Duration; increase of duties.

II. DECLARATION OF ACCESSION.

Signed November 26, 1853; proclaimed January 6, 1854. 10 Stat. at L., Treaties p. 105. U. S. Tr. and Con. 1889, p. 658.

The Grand Duchy of Mecklenburg-Schwerin acceded to the extradition treaty of 1852 between the United States and Prussia and other States of the German Confederation.

Proclamation.

The following proclamation concerns the relations of the United States with Mecklenburg-Schwerin:

By President Jackson, under the act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Mecklenburg-Schwerin; April 28, 1835. III Richardson's Messages, p. 146.

MECKLENBURG-STRELITZ.

(See German Empire, North German Union, and Prussia.)

Declaration.

DECLARATION OF ACCESSION.

Signed December 2, 1853: proclaimed January 26, 1854. 10 Stat. at L., Treaties p. 104. U. S. Tr. and Con. 1889, p. 660.

The Grand Duchy of Mecklenburg-Strelitz acceded to the extradition treaty of 1852 between the United States and Prussia and other States of the Germanic Confederation.

MEXICO.

Treaties and Conventions.

I. TREATY OF LIMITS.

Concluded January 12, 1828; proclaimed April 5, 1832. 8 Stat. at L., p. 372; in Spanish and English. U. S. Tr. and Con. 1889, p. 661.

This treaty of three articles confirmed the boundaries set out in the treaty with Spain, 1819, and provided for a commission to run the line, which was never appointed. The accession of Texas and the war with the United States and Mexico rendered the treaty inoperative. (See U. S. Treaties in Force, 1899, p. 389.)

II. TREATY OF LIMITS.

Concluded April 5, 1831; proclaimed April 5, 1832. 8 Stat. at L., p. 376; in Spanish and English. U. S. Tr. and Con. 1889, p. 663.

This single article extended the time for the exchange of ratifications

of the treaty of 1828, and expired with it. (See U. S. Treaties in Force, 1889, p. 389.)

III. TREATY OF AMITY, COMMERCE AND NAVIGATION.

Concluded April 5, 1831; proclaimed April 5, 1832. 8 Stat. at L., p. 410; in Spanish and English. U. S. Tr. and Con. 1889, p. 664.

This treaty of thirty-four articles, and an additional article, was suspended during the war between the United States and Mexico, 1846–47, but was revived in general by the treaty of 1848, and finally denounced by Mexico November 30, 1881. (See U. S. Treaties in Force, 1899, p. 389.)

IV. TREATY OF LIMITS.

Concluded April 3, 1835; proclaimed April 21, 1836. 8 Stat. at L., p. 464; in Spanish and English. U. S. Tr. and Con. 1889, p. 675.

This single article extended the time for the appointment of the commission to fix the boundary provided for in the treaty of 1828, but it was never appointed. (See U. S. Treaties in Force, 1899, p. 390.)

V. CLAIMS CONVENTION.

Concluded April 11, 1839; proclaimed April 8, 1840. 8 Stat. at L., p. 526; in Spanish and English. U. S. Tr. and Con. 1889, p. 676.

By this treaty of fourteen articles a commission of four members and an umpire named by the King of Prussia was directed to be appointed to adjust the claims of United States citizens against Mexico. The commission held its first session in Washington, D. C., August 25, 1840, and terminated its duties February 25, 1842. (See U. S. Treaties in Force, 1899, p. 390.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1209.

VI. CLAIMS CONVENTION.

Concluded January 30, 1843; proclaimed March 30, 1843. 8 Stat. at L., p. 578; in Spanish and English. U. S. Tr. and Con. 1889, p. 680.

This treaty of seven articles provided for the payment of the awards rendered by the commission under the treaty of 1839.

VII. TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT.

(TREATY OF GUADALUPE-HIDALGO.)

Concluded February 2, 1848; proclaimed July 4, 1848. 9 Stat. at L., Treaties p. 108; in Spanish and English. U. S. Tr. and Con. 1889, p. 681. U. S. Treaties in Force, 1899, p. 391.

The twenty-three articles are:

I. Declaration of peace.
II. Suspension of hostilities.
III. Withdrawal of troops, etc.
IV. Restoration of territory; evacuation; prisoners.
V. Boundary lines.

MEXICO.

VI. Navigation of Gulf of California and the lower Colorado river.
VII. Navigation of Gila and Bravo rivers.
VIII. Inhabitants of ceded territory.
IX. Acquiring United States citizenship.*
X. (Stricken out.)*
XI. Protection against Indians.
XII. Payment for ceded lands.*
XIII. Payment of claims awarded against Mexico.
XIV. Discharge of all prior claims.
XV. Ascertainment of outstanding claims.
XVI. Fortifications.
XVII. Revival of former treaties.
XVIII. Supplies for United States troops occupying Mexico.
XIX. Imports during United States occupation.
XX. Duties on imports before restoration of Mexican customs authorities.
XXI. Arbitration of future disagreements.
XXII. Rules to be observed in case of war.
XXIII. Ratification.
Protocol.

VIII. Treaty of Boundary, Cession of Territory, Transit of Isthmus of Tehuantepec, etc.

(Gadsden Treaty.)

Concluded December 30, 1853; proclaimed June 30, 1854. 10. Stat. at L., Treaties p. 123; in Spanish and English. U. S. Tr. and Con. 1889, p. 694. U. S. Treaties in Force, 1899, p. 403.

The nine articles are:

I. Boundary established; survey, etc.
II. Release of obligations as to Indians.
III. Payment for territory acquired.
IV. Navigation of Gulf of California, Colorado and Bravo rivers.
V. Inhabitants of ceded territory; fortifications; navigation and commerce.
VI. Recognition of land grants.
VII. Adjustment of future differences.
VIII. Transit of Tehuantepec Isthmus.
IX. Ratification.

IX. Extradition Treaty.

Concluded December 11, 1861; proclaimed June 20, 1862. 12 Stat. at L., p. 1199; in Spanish and English. U. S. Tr. and Con. 1889, p. 698.

By notification from the Mexican Government this treaty was abrogated January 20, 1899. (See U. S. Treaties in Force, 1899, p. 407.)

X. Claims Convention.

Concluded July 4, 1868; proclaimed February 1, 1869. 15 Stat. at L., p. 679; in Spanish and English. U. S. Tr. and Con. 1889, p. 700.

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* For explanation of these articles see the protocol at the close of the treaty.

MEXICO.

Under this convention of seven articles a joint commission was appointed to consider mutual claims, consisting of one commissioner for each country, who together chose an umpire. The first meeting took place August 10, 1869, considered to have been held July 31, 1869. The final session was January 31, 1876. The awards rendered were: In favor of citizens of the United States, $4,125,622.20; and in favor of citizens of Mexico, $150,498.41. (See U. S. Treaties in Force, 1899, p. 408.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1287.

XI. NATURALIZATION CONVENTION.

Concluded July 10, 1868; proclaimed February 1, 1869. 15 Stat. at L., p. 687; in Spanish and English. U. S. Tr. and Con. 1889, p. 704.

This convention of six articles was terminated February 11, 1882, upon notification given by Mexico. (See U. S. Treaties in Force, 1899, p. 408.)

XII. CLAIMS CONVENTION.

Concluded April 19, 1871; proclaimed February 8, 1872. 17 Stat. at L., p. 861; in Spanish and English. U. S. Tr. and Con. 1889, p. 705.

By this convention of two articles the duration of the claims commission organized under the Convention of 1868 was extended one year.

XIII. CLAIMS CONVENTION.

Concluded November 27, 1872; proclaimed July 24, 1873. 18 Stat. at L., Treaties p. 76; in Spanish and English. U. S. Tr. and Con. 1889, p. 706.

The time for the completion of the labors of the claims commission under the convention of 1868 was further extended by this convention for another year.

XIV. CLAIMS CONVENTION.

Concluded November 20, 1874; proclaimed January 28, 1875. 18 Stat. at L., Treaties p. 149; in Spanish and English. U. S. Tr. and Con. 1889, p. 707.

The claims commission under the convention of 1868 was still further extended by this convention for another year.

XV. CLAIMS CONVENTION.

Concluded April 29, 1876; proclaimed June 29, 1876. 19 Stat. at L., Treaties p. 86; in Spanish and English. U. S. Tr. and Con. 1889, p. 709.

The functions of the umpire under the convention of 1868 were extended by this convention of three articles until November 20, 1876, and provision made for the payment of the awards.

MEXICO.

XVI. BOUNDARY CONVENTION.

Concluded July 29, 1882; proclaimed March 5, 1883. 22 Stat. at L., p. 986; in Spanish and English. U. S. Tr. and Con. 1889, p. 711. U. S. Treaties in Force, 1899, p. 409.

This convention although temporary in its character is yet of importance, because Article IX provides for the punishment of persons destroying or defacing the monuments marking the boundary.

The nine articles are:

I. Preliminary reconnaissance.
II. International Boundary Commission authorized.
III. Powers of commission.
IV. Boundary monuments.
V. Reports of commission.
VI. Expenses.
VII. Payment for monuments.
VIII. Duration of commission.
IX. Protection of monuments; ratification.

XVII. AGREEMENT.

Signed July 29, 1882. 22 Stat. at L., p. 934; in Spanish and English.

This agreement of nine articles permits troops of either country to cross the border in pursuit of hostile Indians.

XVIII. AGREEMENT.

Signed September 21, 1882. 22 Stat. at L., p. 939; in Spanish and English.

This modifies Article VIII of the last preceding agreement.

XIX. COMMERCIAL RECIPROCITY CONVENTION.

Concluded January 20, 1883; proclaimed June 2, 1884. 24 Stat. at L., p. 975; in Spanish and English. U. S. Tr. and Con. 1889, p. 714.

This convention of ten articles made mutual agreements for the importation of certain products of each country into the other free of duty.

Owing to the failure of legislation to carry the convention into effect it ceased to be operative May 20, 1887. (U. S. Treaties in Force, 1899, p. 412.)

XX. AGREEMENT.

Signed June 29, 1883. 23 Stat. at L., p. 734; in Spanish and English.

The agreement of July 29, 1882 is extended to remain in force until August 18, 1884.

XXI. PROTOCOL.

Signed October 31, 1884. 23 Stat. at L., p. 806; in Spanish and English.

The agreement of July 29, 1882 is further extended to remain in force until October 1, 1885.

XXII. BOUNDARY CONVENTION, RIO GRANDE AND RIO COLORADO.

Concluded November 12, 1884; proclaimed September 14, 1886. 24 Stat.

at L., p. 1011; in Spanish and English. U. S. Tr. and Con. 1889, p. 721. U. S. Treaties in Force, 1899, p. 412.

The six articles are:

I. Boundaries in rivers named.
II. Changes.
III. Artificial changes.
IV. Bridges.
V. Riparian rights.
VI. Ratification.

XXIII. Reciprocity Convention.

Concluded February 25, 1885; proclaimed May 4, 1886. 25 Stat. at L., p. 1370; in Spanish and English. U. S. Tr. and Con. 1889, p. 722.

The time for the enactment of legislation to carry into effect the convention of 1883 was extended by this convention to May 20, 1886.

XXIV. Boundary Convention.

Concluded December 5, 1885; proclaimed June 28, 1887. 25 Stat. at L., p. 1390; in Spanish and English. U. S. Tr. and Con. 1889, p. 1189.

The time for completing the work of the Boundary Commission authorized under the convention of 1882 was extended eighteen months by this convention.

XXV. Reciprocity Convention.

Concluded May 14, 1886; proclaimed February 1, 1887. 24 Stat. at L., p. 1018; in Spanish and English. U. S. Tr. and Con. 1889, p. 1190.

The time for the enactment of legislation to carry the convention of 1883 into effect was further extended by this convention to May 20, 1887.

XXVI. Boundary Convention.

Concluded February 18, 1889; proclaimed October 14, 1889. 26 Stat. at L., p. 1493; in Spanish and English.

Owing to the failure to appoint the commission authorized by the convention of 1882 within the time specified, as extended by the convention of 1885, it ceased to have effect. By this convention the provisions of the convention of 1882 were revived for a period of five years from the date of the exchange of ratifications.

XXVII. Boundary Convention.

Concluded March 1, 1889; proclaimed December 26, 1890. 26 Stat. at L., p. 1512; in Spanish and English. U. S. Treaties in Force, 1899, p. 415.

The nine articles are:

I. International Boundary Commission authorized.
II. Composition.
III. Meetings of commission.
IV. Duties.
V. Investigation of works on banks of Colorado and Rio Grande.
VI. Examinations.
VII. Jurisdiction.

MEXICO.

VIII. Decisions. | IX. Ratification.

XXVIII. AGREEMENT.

Signed June 25, 1890. Published in leaflet by the State Department.

This agreement of ten articles gives a reciprocal right to pursue Indians across the boundary.

XXIX. AGREEMENT.

Signed, November 25, 1892. Published in leaflet by the State Department.

This agreement extends the last preceding agreement.

XXX. BOUNDARY CONVENTION.

Concluded August 24, 1894; proclaimed October 18, 1894. 28 Stat. at L., p. 1213; in Spanish and English.

The period for the completion of the work of the boundary commission under the convention of 1889 was extended by this convention two years from October 11, 1894.

XXXI. BOUNDARY CONVENTION.

Concluded October 1, 1895; proclaimed December 21, 1885. 29 Stat. at L., p. 841; in Spanish and English.

The duration of the convention of 1889, was extended one year by this convention.

XXXII. AGREEMENT.

Signed June 4, 1896. For. Rel. U. S. 1896, p. 438.

This agreement of ten articles gives a reciprocal right to pursue Indians across the boundary.

XXXIII. BOUNDARY CONVENTION.

Concluded November 6, 1896; proclaimed December 23, 1896. 29 Stat. at L., p. 857; in Spanish and English.

The convention of 1889 was further extended to December 24, 1895, by this convention.

XXXIV. PROTOCOL.

Signed March 2, 1897. Not ratified or proclaimed. 30 Stat. at L., p. 1593; in Spanish and English.

This protocol of six articles submits two claims to arbitrators.

XXXV. BOUNDARY CONVENTION.

Concluded October 29, 1897; proclaimed December 21, 1897. 30 Stat. at L., p. 1625; in Spanish and English.

This convention further extended the duration of the convention of 1889 to December 24, 1898.

XXXVI. BOUNDARY CONVENTION.

Concluded December 2, 1898; proclaimed February 3, 1899. 30 Stat. at L., p. 1744; in Spanish and English.

The convention of 1889, was again extended one year by this convention.

MEXICO.

XXXVII. EXTRADITION TREATY.

Concluded February 22, 1899; proclaimed April 24, 1899. 31 Stat. at L., p. 1818; in Spanish and English.

The nineteen articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Necessary evidence, political crimes excepted, bar of limitation, previous acquittal.
IV. Citizens excepted.
V. Deferring surrender.
VI. Persons claimed by two or more countries.
VII. Trial only for offense for which surrendered.
VIII. Form of requisition.
IX. Offenses in frontier states.
X. Provisional arrest.
XI. Officers of surrendering government to assist.
XII. Consent of surrendering government necessary to trial by third power.
XIII. Trial for extradited offense only.
XIV. Expenses.
XV. Disposal of articles found on fugitive.
XVI. Transit across territory of third power.
XVII. Diligence to be observed.
XVIII. Effect.
XIX. Duration.

XXXVIII. BOUNDARY CONVENTION.

Signed December 22, 1899; proclaimed May 7, 1900. Published in leaflet by the State Department.

This convention extends that of March 1, 1889 until December 24, 1900.

XXXIX. BOUNDARY CONVENTION.

Signed November 21, 1900; proclaimed December 24, 1900. 31 Stat. at L., p. 1936; in Spanish and English.

This convention extends the boundary convention of 1889 indefinitely.

Proclamations.

The following proclamations concern the relations of the United States with Mexico:

1. By President Polk, reciting the declaration of war with Mexico, and calling upon all citizens to preserve order; May 13, 1846. IV Richardson's Messages, p. 470.

2. By President Pierce, under Article I of the treaty of 1853, declaring the boundaries between the United States and Mexico; June 2, 1856. V Richardson's Messages, p. 393.

3. By President Johnson, declaring void the blockade of Matamoras and other Mexican ports, decreed by the Emperor Maximilian; August 17, 1866. VI Richardson's Messages, p. 433.

4. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Mexico, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

5. By President Cleveland, under the Act of Congress of March 3, 1891

(26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the citizens of Mexico; February 27, 1896. IX Richardson's Messages, p. 690.

6. By President McKinley, under the Act of Congress of July 24, 1897 (30 Stat. at L., p. 214), exempting Mexican vessels from paying the tonnage dues imposed by sec. 4219, of the Revised Statutes; November 12, 1897. 30 stat. at L., p. 1767.

MOROCCO.

Treaties and Conventions.

I. Treaty of Peace and Friendship.

Concluded January, 1787; ratified by the Continental Congress July 18, 1787. 8 Stat. at L., p. 100. U. S. Tr. and Con. 1889, p. 724.

This treaty of twenty-six articles was superseded by the following treaty of 1836. (See U. S. Treaties in Force, 1899, p. 420.)

II. Treaty of Peace and Friendship.

Concluded September 16, 1836; proclaimed January 30, 1837. 8 Stat. at L., p. 484. U. S. Tr. and Con. 1889, p. 729. U. S. Treaties in Force, 1899, p. 420.)

The twenty-five articles are:

I. Emperor's consent.
II. No service with an enemy.
III. Captures.
IV. Ships' passports.
V. Right of search.
VI. Release of captives.
VII. Supplies to vessels.
VIII. Repairs to vessels.
IX. Shipwrecks.
X. Protection of war ships.
XI. Immunities of ports.
XII. Freedom of war ships.
XIII. Salutes.
XIV. Most favored nation commerce.
XV. Privileges to merchants.
XVI. Exchange of prisoners.
XVII. Trade privileges.
XVIII. Examination of exports.
XIX. No detention, etc., of vessels.
XX. Consul to decide disputes in Morocco.
XXI. Trials of homicides and assaults.
XXII. Estates of deceased Americans.
XXIII. Consular privileges.
XXIV. Agreement in case of differences; most favored nation privileges.
XXV. Duration.

III. Convention as to Cape Spartel Light-House.

Concluded between the United States, Austria, Belgium, France, Great Britain, Italy, The Netherlands, Portugal, Spain, and Sweden and Norway, and Morocco, May 31, 1865; proclaimed March 12, 1867. 14 Stat. at L., p. 679. U. S. Tr. and Con. 1889, p. 734. U. S. Treaties in Force, 1899, p. 425.

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The seven articles are:

I. Administration of the light-house.
II. Expense of maintenance.
III. Protection.
IV. Management.
V. Duration.
VI. Regulations.
VII. Ratification.

IV. CONVENTION AS TO PROTECTION.

Concluded between the United States, Germany, Austria, Belgium, Denmark, Spain, France, Great Britain, Italy, The Netherlands, Portugal, and Sweden and Norway and Morocco, July 3, 1880; proclaimed December 21, 1881. 22 Stat. at L., p. 817; in French with an English translation. U. S. Tr. and Con. 1889, p. 737. U. S. Treaties in Force, 1899, p. 428.

The eighteen articles are:

I. Conditions of protection.
II. Employees of legations.
III. Consular employees.
IV. Diplomatic rights; suits; prosecutions.
V. Native consular agents.
VI. Extent of protection.
VII. Names to be furnished by legations.
VIII. Names to be furnished by consulates.
IX. Classes not protected.
X. Brokers.
XI. Property rights.
XII. Agricultural tax.
XIII. Gate tax.
XIV. Mediation of native employees.
XV. Naturalization.
XVI. Limitation of protection.
XVII. Most favored nation treatment.
XVIII. Ratification.

MUSCAT.

Treaty.

TREATY OF AMITY AND COMMERCE.

Concluded September 21, 1833; proclaimed June 24, 1837. 8 Stat. at L., p. 458. U. S. Tr. and Con. 1889, p. 744. U. S. Treaties in Force, 1899, p. 435.

The nine articles are:

I. Peace.
II. Freedom of trade.
III. Duties payable by American ships.
IV. Duties, licenses and charges.
V. Shipwrecks.
VI. Exemption from tax on trade.
VII. Captures by pirates.
VIII. Shipping charges in the United States.
IX. Consular powers and immunities. Ratification.

NASSAU.

(See German Empire and Prussia.)

Convention.

NASSAU.

CONVENTION ABOLISHING DROIT D' AUBAINE AND EMIGRATION TAXES.

Concluded May 27, 1846; proclaimed January 26, 1847. 9 Stat. at L., Treaties p. 48; in German and English. U. S. Tr. and Con. 1889, p. 747.

Nassau was merged with Prussia by conquest 1866. (See U. S. Treaties in Force, 1899, p. 438.)

NETHERLANDS.

Treaties and Conventions.

I. TREATY OF PEACE AND COMMERCE.

Concluded October 8, 1782; ratified by the Continental Congress January 22, 1783. 8 Stat. at L., p. 32, in Dutch and English. U. S. Tr. and Con. 1889, p. 749.

This treaty of twenty-nine articles was abrogated by the overthrow of The Netherlands Government in 1795. (See U. S. Treaties in Force, 1899, p. 439.)

II. CONVENTION RELATIVE TO RECAPTURED VESSELS.

Concluded October 8, 1782; ratified by the Continental Congress January 23, 1783. 8 Stat. at L., p. 50; in Dutch and English. U. S. Tr. and Con. 1889, p. 759.

This convention of six articles was abrogated by the overthrow of the Netherlands Government in 1795. (See U. S. Treaties in Force, 1899, p. 439.)

III. TREATY OF COMMERCE AND NAVIGATION.

Concluded January 19, 1839; proclaimed May 24, 1839. 8 Stat. at L., p. 524; in Dutch and English. U. S. Tr. and Con., 1889, p. 761. U. S. Treaties in Force, 1899, p. 439.

The seven articles are:

I. Import and export duties, drawbacks, etc.
II. Shipping charges.
III. Consular officers.
IV. Nationality of ships.
V. Shipwrecks.
VI. Duration.
VII. Ratification.

IV. CONVENTION OF COMMERCE AND NAVIGATION.

Concluded August 26, 1852; proclaimed February 26, 1853. 10 Stat. at L., Treaties p. 66; in Dutch and English. U. S. Tr. and Con. 1889, p. 763. U. S. Treaties in Force, 1899, p. 441.

The seven articles are:

I. Import and export duties, bounties, drawbacks, etc.
II. Trade with colonies of the Netherlands.
III. Shipping dues.
IV Coasting trade and fisheries.
V. Discriminations in favor of direct trade.
VI. Duration and extent.
VII. Ratification.

NETHERLANDS.

V. CONSULAR CONVENTION.

Concluded January 22, 1855; proclaimed May 26, 1855. U. S. Tr. and Con. 1889, p. 765.

By this convention consuls were received into the colonies of The Netherlands. It was abrogated August 20, 1879, being superseded by the convention of 1878. (See U. S. Treaties in Force, 1899, p. 443.)

VI. CONSULAR CONVENTION.

Concluded May 23, 1878; proclaimed August 1, 1879. 21 Stat. at L., p. 662; in Dutch and English. U. S. Tr. and Con. 1889, p. 769. U. S. Treaties in Force, 1899, p. 444.

The seventeen articles are:

I. Consular officers authorized.
II. Commissions and exequaturs.
III. Exemptions and privileges.
IV. Testimony by consular officers.
V. Arms and flags.
VI. Inviolability of archives.
VII. Acting consular officers.
VIII. Vice-consular officers and agents.
IX. Communication with authorities.
X. Rights of consular officers.
XI. Settlement of shipping disputes.
XII. Deserters from ships.
XIII. Damages at sea.
XIV. Shipwrecks and salvage.
XV. Notification of deaths.
XVI. Duration.
XVII. Ratification.

VII. EXTRADITION CONVENTION.

Concluded May 22, 1880; proclaimed July 30, 1880. 21 Stat. at L., p. 769; in Dutch and English. U. S. Tr. and Con. 1889, p. 775.

This convention of twelve articles was superseded by the convention of 1887, which follows. (See U. S. Treaties in Force, 1899, p. 449.)

VIII. EXTRADITION CONVENTION.

Concluded June 2, 1887; proclaimed June 21, 1889. 26 Stat. at L., p. 1481; in Dutch and English. U. S. Treaties in Force, 1899, p. 450.

The thirteen articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Political offenses.
IV. Restrictions on trials.
V. Exemptions.
VI. Persons under arrest in country where found.
VII. Persons claimed by two or more powers.
VIII. Nondelivery of citizens.
IX. Expenses.
X. Articles found on fugitives.
XI. Procedure.
XII. Provisional arrest and detention.
XIII. Duration; ratification.

NETHERLANDS.

Proclamations.

The following proclamations concern the relations of the United States with The Netherlands:

1. By President Cleveland, under the Act of Congress of June 19, 1886 (24 Stat. at L., p. 79), suspended the tonnage tax on vessels coming from the ports of The Netherlands and certain ports in the Dutch East Indies, except the vessels of countries which impose discriminating duties on United States vessels; April 22, 1887. VIII Richardson's Messages, p. 569.

2. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from The Netherlands, and Dutch Guiana, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

3. By President McKinley, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of The Netherlands; November 20, 1899. 31 Stat. at L., p. 1961.

Diplomatic Correspondence.

By an interchange of notes February 10 and February 16, 1883, (published in leaflet by the State Department) the benefit of the act of March 3, 1881 (21 Stat. at L., p. 502) as to trade-marks is extended to The Netherlands.

NEW GRANADA.

(See Colombia.)

NICARAGUA.

Treaties and Conventions.

I. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, AND AS TO ISTHMIAN TRANSIT.

Concluded June 21, 1867; proclaimed August 13, 1868. 15 Stat. at L., p. 549; in Spanish and English. U. S. Tr. and Con. 1889, p. 779. U. S. Treaties in Force, 1899, p. 455.

The twenty-one articles are:

I. Amity.
II. Freedom of commerce; coasting trade.
III. Most favored nation privileges.
IV. Import and export duties.
V. Shipping dues.
VI. Freedom of carrying trade, bounties, etc.
VII. Trade privileges, etc.
VIII. Property rights, etc.
IX. Civil rights.
X. Diplomatic and consular privileges.
XI. Property rights, etc., in case of war.
XII. Religious freedom, etc.
XIII. Asylum to vessels.
XIV. Transit from Atlantic to Pacific oceans.
XV. Neutrality, etc., of transit.
XVI. Protection of transit.

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XVII. Withdrawal of United States protection.
XVIII. Protection of grants.
XIX. Dividends of transit company.
XX. Duration.
XXI. Ratification.

II. EXTRADITION CONVENTION.

Concluded June 25, 1870; proclaimed September 19, 1871. 17 Stat. at L., p. 815; in Spanish and English. U. S. Tr. and Con. 1889, p. 787. U. S. Treaties in Force, 1899, p. 463.

The seven articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Political and previous offenses.
IV. Persons under arrest in country where found.
V. Procedure.
VI. Expenses.
VII. Duration; ratification.

III. PROTOCOL.

Signed March 22, 1900. Published in leaflet by the State Department.

This agreement of eight articles submits the claims of some American citizens against Nicaragua to an arbitrator.

Proclamations.

The following proclamations concern the relations of the United States with Nicaragua:

1. By President Lincoln, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Nicaragua; December 16, 1863. VI Richardson's Messages, p. 215.

2. By President Arthur, under the Act of Congress of June 26, 1884 (23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from San Juan del Norte (Greytown); February 26, 1885. VIII Richardson's Messages, p. 285.

3. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., pp. 567, 612), announcing the action of Nicaragua in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; March 12, 1892. IX Richardson's Messages, p. 263.

4. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., pp. 727, 733), suspending the prohibition of the importation of cattle from Nicaragua, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

NORTH GERMAN UNION.

Convention.

(See also German Empire and Prussia.)

NATURALIZATION CONVENTION.

Concluded February 22, 1868; proclaimed May 27, 1868. 15 Stat. at L.,

NORTH GERMAN UNION.

p. 615; in German and English. U. S. Tr. and Con. 1889, p. 790. U. S. Treaties in Force, 1899, p. 466.

The six articles are:

I. Naturalization recognized.
II. Punishment for offenses prior to naturalization.
III. Extradition.
IV. Renunciation of naturalization.
V. Duration.
VI. Ratification.

Proclamations.

The following proclamations concern the relations of the United States with the North German Union:

1. By President Grant, under the Act of Congress of June 11, 1864, (13 Stat. at L., p. 121), establishing German consular courts under said act; February 10, 1870. VII Richardson's Messages, p. 84.

2. By President Grant, declaring the neutrality of the United States in the Franco-Prussian War; August 22, 1870. VII Richardson's Messages, p. 86.

3. By President Grant, forbidding the use of United States ports by war vessels of France or Germany, while at war with each other, except under certain conditions; October 8, 1870. VII Richardson's Messages, p. 89.

NORWAY.

Treaty.

(See Sweden and Norway.)

EXTRADITION CONVENTION.

Concluded June 7, 1893; proclaimed November 9, 1893. 28 Stat. at L., p. 1187; in Norwegian and English. U. S. Treaties in Force, 1899, p. 468.

The twelve articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitives.
X. Persons claimed by other countries.
XI. Expenses.
XII. Duration; ratification.

Proclamations.

The following proclamations concern the relations of the United States with Norway:

1. By President Monroe, under the Act of Congress of March 3, 1815 (3 Stat. at L., p. 224), repealing discriminating duties on vessels and goods imported from Norway; August 20, 1821. II Richardson's Messages, p. 96.

NORWAY.

2. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Norway, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

OLDENBURG.

(See German Empire, North German Union, and Prussia.)

Declarations.

In 1867 the Dutchy of Oldenburg became incorporated in the North German Union. (See U. S. Tr. and Con. 1899, p. 472.)

I. DECLARATION OF ACCESSION.

Signed March 10, 1847. 9 Stat. at L., Treaties p. 66. U. S. Tr. and Con. 1889, p. 792.

By this declaration Oldenburg acceded to the treaty of June 10, 1846, with Hanover.

II. DECLARATION OF ACCESSION.

Signed December 30, 1853; proclaimed March 21, 1853. 10 Stat. at L., Treaties p. 105. U. S. Tr. and Con. 1889, p. 793.

By this declaration, Oldenburg acceded to the extradition treaty of June 16, 1852, with Prussia.

Proclamations.

The following proclamations concern the relations of the United States with Oldenburg:

1. By President Monroe, under the Act of Congress of March 3, 1815 (3 Stat. at L., p. 224), repealing discriminating duties on vessels and goods imported from Oldenburg; November 22, 1821. II Richardson's Messages, p. 97.

2. By President Jackson, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Oldenburg; September 18, 1830. II Richardson's Messages, p. 496.

3. By President Johnson, revoking the *exequatur* of the consul of Oldenburg at New York; December 20, 1866. VI Richardson's Messages, p. 512.

ORANGE FREE STATE.

Treaty and Convention.

I. CONVENTION OF FRIENDSHIP, COMMERCE AND EXTRADITION.

Concluded December 22, 1871; proclaimed August 23, 1873. 18 Stat. at L., Treaties p. 65. U. S. Tr. and Con. 1889, p. 794.

By notification of the Government of the Orange Free State this con-

vention of fourteen articles was denounced, January 4, 1895. (See U. S. Treaties in Force, 1899, p. 473.)

II. EXTRADITION TREATY.

Concluded October 28, 1896; proclaimed April 21, 1899. 31 Stat. at L., p. 1813.

The twelve articles are:

I. Delivery of accused.
II. Extraditable crimes.
III. Requisitions.
IV. Provisional arrest.
V. Citizens excepted.
VI. Political offences excepted.
VII. Limitation of time.
VIII. Trial only for offence for which surrendered.
IX. Disposal of articles seized.
X. Persons claimed by two or more countries.
XI. Expenses.
XII. Effect; duration.

OTTOMAN EMPIRE.

(TURKEY.)

Treaties and Conventions.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded May 7, 1830; proclaimed February 4, 1832. 8 Stat. at L., p. 408. U. S. Tr. and Con. 1889, p. 798. U. S. Treaties in Force, 1899, p. 474.

(The text printed in the treaty volumes is a translation from the original treaty, which was in the Turkish language. Differences of opinion as to the true meaning of certain portions have been the subject of diplomatic correspondence without reaching an accord.)

The nine articles are:

I. Trade privileges.
II. Consular officers.
III. Treatment of United States merchants and vessels.
IV. Judicial treatment of the United States citizens.
V. Use of United States flag.
VI. War vessels.
VII. Navigation of the Black Sea.
VIII. Ships not to be impressed.
IX. Shipwrecks.
Ratification.

II. TREATY OF COMMERCE AND NAVIGATION.

Concluded February 25, 1862; proclaimed July 2, 1862. 12 Stat. at L., p. 1213. 13 Stat. at L., p. 609; in French and English. U. S. Tr. and Con. 1889, p. 800.

This treaty of twenty-three articles is contended to have been abrogated upon notice given by the Turkish Government, to date from June 5, 1884. (U. S. Treaties in Force, 1899, p. 477.)

III. EXTRADITION TREATY.

Concluded August 11, 1874; proclaimed May 26, 1875. 19 Stat. at L., Treaties p. 16; in French and English. U. S. Tr. and Con. 1889, p. 821. U. S. Treaties in Force, 1899, p. 477.

OTTOMAN EMPIRE.

The eight articles are :

I. Surrender of accused.
II. Extraditable crimes.
III. Political offenses.
IV. Persons under arrest.
V. Procedure.
VI. Expenses.
VII. Nondelivery of citizens.
VIII. Duration ; ratification.

IV. PROTOCOL.

Concluded August 11, 1874; proclaimed October 29, 1874. 18 Stat. at L., Proclamations p. xiv. U. S. Tr. and Con. 1889, p. 824. U. S. Treaties in Force, 1899, p. 479.

This protocol sets forth the right of United States citizens to hold real estate in the Turkish dominions, and contains also a translation of the Imperial rescript in French, setting forth the law on that subject.

THE PAPAL STATES.

Proclamations.

The following proclamations concern the relations of the United States with the Papal States:

1. By President Adams, under the Act of Congress of January 7, 1824 (4 Stat. at L., p. 2), removing discriminating duties of tonnage and impost from vessels and merchandise of the Papal States; June 7, 1827. II Richardson's Messages, p. 376.

2. By President Buchanan, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of the Papal States; February 25, 1858. V Richardson's Messages, p. 491.

PARAGUAY.

Treaty and Convention.

I. CLAIMS CONVENTION.

Concluded February 4, 1859; proclaimed March 12, 1860. 12 Stat. at L., p. 1087; in Spanish and English. U. S. Tr. and Con. 1889, p. 828.

By this convention the claim of the United States and Paraguay Navigation Company against Paraguay was submitted to a commission of two, who met in Washington June 22, 1860, and adjourned August 13, 1860, deciding against the claim. For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II. p. 1485.

II. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded February 4, 1859; proclaimed March 12, 1860. 12 Stat. at L., p. 1091; in Spanish and English. U. S. Tr. and Con. 1889, p. 830. U. S. Treaties in Force, 1899, p. 483.

PARAGUAY.

The sixteen articles are:

I. Friendship.
II. Freedom of navigation.
III. Most favored nation commercial privileges.
IV. No discriminations of imports and exports.
V. Shipping dues.
VI. Carrying trade.
VII. Nationality of vessels.
VIII. Import and export duties.
IX. Trade priviliges.
X. Property rights; estates of deceased persons.
XI. Exemption from military service, etc.
XII. Diplomatic and consular privileges.
XIII. Agreement in case of war.
XIV. Protection of property; religious freedom, etc.
XV. Duration.
XVI. Ratification.

Proclamation.

The following proclamation concerns the relations of the United States with Paraguay:

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Paraguay, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

PERSIA.

Treaty.

TREATY OF FRIENDSHIP AND COMMERCE.

Concluded December 13, 1856; proclaimed August 18, 1857. 11 Stat. at L., p. 709. U. S. Tr. and Con. 1889, p. 836. U. S. Treaties in Force, 1899, p. 489.

The eight articles are:

I. Friendship.
II. Diplomatic privileges.
III. Most favored nation protection.
IV. Import and export duties.
V. Trials of suits and offenses.
VI. Effects of deceased persons.
VII. Diplomatic and consular privileges.
VIII. Duration; ratification.

PERU.

Treaties and Conventions.

I. CLAIMS CONVENTION.

Concluded March 17, 1841; proclaimed January 8, 1847. 8 Stat. at L., p. 570; see also 9 Stat. at L., Treaties p. 37. U. S. Tr. and Con. 1889, p. 850.

By this convention Peru agreed to pay to the United States in settlement of claims which had been presented by citizens of the United States the sum of $300,000. The claims were adjudicated by the Attorney-General, and the final report was made August 7, 1847, allowing claims

amounting to $421,432.41. (See U. S. Treaties in Force, 1899, p. 493.) For the proceedings for distributing this payment, see Moore's History of International Arbitration, Vol. V, p. 4591.

II. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 26, 1851; proclaimed July 19, 1852. 10 Stat. at L., Treaties p. 28; in Spanish and English. U. S. Tr. and Con. 1889, p. 852.

This treaty, consisting of forty articles, was terminated December 9, 1863, upon notice given by Peru. (U. S. Treaties in Force, 1899, p. 493.)

III. CONVENTION DECLARING THE PRINCIPLES OF THE RIGHTS OF NEUTRALS AT SEA.

Concluded July 22, 1856; proclaimed November 2, 1857. 11 Stat. at L., p. 695; in Spanish and English. U. S. Tr. and Con. 1889, p. 864. U. S. Treaties in Force, 1899, p. 493.

The five articles are:

I. Principles of neutral property rights.
II. Former treaty provisions annulled.
III. Extension of neutral rights.
IV. Accession of other countries.
V. Duration; ratification.

IV. CONVENTION INTERPRETING ARTICLE XII, TREATY OF 1857. (WHALING SHIPS.)

Concluded July 4, 1857; proclaimed October 14, 1858. 11 Stat. at L., p. 725; in Spanish and English. U. S. Tr. and Con. 1889, p. 866.

By this convention amendment was made to Article XII of the treaty of 1851 in respect to whaling ships. The convention terminated December 9, 1863, with the treaty of 1851. (See U. S. Treaties in Force, 1899, p. 495.)

V. CLAIMS CONVENTION.

Concluded December 20, 1862; proclaimed May 19, 1863. 13 Stat. at L., p. 635; in Spanish and English. U. S. Tr. and Con. 1889, p. 868.

The claim presented against Peru by the United States for the alleged illegal capture of the vessels *Lizzie Thompson* and *Georgiana* were by this convention referred to the arbitration of the King of Belgium, who declined to act and the cases were dropped. (See U. S. Treaties in Force, 1899, p. 495.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1593.

VI. CLAIMS CONVENTION.

Concluded January 12, 1863; proclaimed May 19, 1863. 13 Stat. at L., p. 639; in Spanish and English. U. S. Tr. and Con. 1889, p. 870.

By this convention of ten articles a commission of five was authorized, which met at Lima, July 17, 1863, and completed their duties

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November 27, 1863. The awards against the United States were $25,300) and against Peru, $57,196.23. (See U. S. Treaties in Force, 1899, p. 496., For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1615.

VII. CLAIMS CONVENTION.

Concluded December 4, 1868; proclaimed July 6, 1869. 16 Stat. at L., p. 751; in Spanish and English. U. S. Tr. and Con. 1889, p. 872.

This convention provided for the adjudication of mutual claims by two commissioners who selected an umpire. The commission met at Lima September 4, 1869, and adjourned February 26, 1870. The awards against the United States were $57,040 and against Peru $194,417.62. (See U. S. Treaties in Force, 1899, p. 496.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1639.

VIII. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded September 6, 1870; proclaimed July 27, 1874. 18 Stat. at L., Treaties p. 14; in Spanish and English. U. S. Tr. and Con. 1889, p. 876.

This treaty of thirty-eight articles terminated on notice given by Peru, March 31, 1886. See Treaty of 1887. (See U. S. Treaties in Force, 1899, p. 496.)

IX. EXTRADITION TREATY.

Concluded September 12, 1870; proclaimed July 27, 1874. 18 Stat. at L., Treaties p. 35; in Spanish and English. U. S. Tr. and Con. 1889, p. 888.

This treaty of ten articles terminated March 31, 1886, on notice given by Peru. (See U. S. Treaties in Force, 1899, p. 496.)

X. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded August 31, 1887; proclaimed November 7, 1888. 25 Stat. at L., p. 1444; in Spanish and English. U. S. Tr. and Con. 1889, p. 1191.

By notification from the Peruvian Government this treaty terminated November 1, 1899. (See U. S. Treaties in Force, 1899, p. 497.)

XI. PROTOCOL.

Signed May 17, 1898. Published in leaflet by the State Department.

This agreement of seven articles refers the decision of the amount of damages, due to an American citizen from Peru, to an arbitrator.

XII. PROTOCOL.

Signed June 6, 1898. Published in leaflet by the State Department.

This agreement amends the preceding protocol.

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XIII. EXTRADITION TREATY.

Signed November 28, 1899; proclaimed January 29, 1901. 31 Stat. at L., p. 1921; in Spanish and English.

The thirteen articles are:

I. Extradition.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Citizens excepted.
VI. Political offenses excepted.
VII. Limitations.
VIII. Deferring extradition.
IX. Trial only on extradited crime.
X. Disposition of seized articles.
XI. Persons claimed by two or more countries.
XII. Expenses.
XIII. Ratification.

Proclamation.

The following proclamation concerns the relations of the United States with Peru:

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Peru, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

PERU-BOLIVIA.

Convention.

CONVENTION OF PEACE, FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded November 30, 1836; proclaimed October 3, 1838. 8 Stat. at L., p. 487. U. S. Tr. and Con. 1889, p. 840.

This convention terminated by the dissolution of the Peru-Bolivia Confederation in 1839. (See U. S. Treaties in Force, 1899, p. 508.)

PORTUGAL.

Treaties and Conventions.

I. TREATY OF COMMERCE AND NAVIGATION.

Concluded August 26, 1840; proclaimed April 24, 1841. 8 Stat. at L., p. 560; in Portuguese and English. U. S. Tr. and Con. 1889, p. 891.

This general treaty of fourteen articles was terminated by notice of the Portuguese Government, January 31, 1892. (See U. S. Treaties in Force, 1899, p. 509.)

II. CLAIMS CONVENTION.

Concluded February 26, 1851; proclaimed September 1, 1851. 10 Stat. at L., Treaties p. 91; in Portuguese and English. U. S. Tr. and Con. 1889, p. 896.

By this convention Portugal agreed to pay the United States $91,727 in full for all claims of American citizens against Portugal, except the claim of the brig Samuel Armstrong, which was referred to Louis Napoleon, President of France, as arbitrator, and November 30, 1852, he decided that no indemnity was due from Portugal to the United States on account of the claim. (See U. S. Treaties in Force, 1899, p. 509.) For an account of the arbitration under this convention, see Moore's History of International Arbitration, Vol. II, p. 1071.

III. Protocol of Arbitration.

Signed June 13, 1891. Moore's History of International Arbitration, Vol. II, p. 1874.

This protocol of five articles was agreed to by the United States, Great Britain and Portugal. Under it a commission of three, appointed by the President of the Swiss Republic, passed on the claims of citizens of the United States, and of Great Britain, against Portugal because of the rescission of the concession of the Lourenço Marques Railroad by the last named Government.

IV. Commercial Agreement.

Signed May 22, 1899; proclaimed June 12, 1900. 31 Stat. at L., pp. 1913 and 1974.

This agreement of four articles provides for a reciprocal reduction of tariff duties, as provided by the Act of Congress of July 24, 1897 (30 Stat. at L., p. 151, 203.)

Proclamations.

The following proclamations concern the relations of the United States with Portugal:

1. By President Van Buren, under the Act of Congress of May 25, 1832 (4 Stat. at L., p. 517), removing the duties imposed by said act as to the vessels of Portugal; October 11, 1837. III Richardson's Messages, p. 372.

2. By President Grant, revoking the *exequatur* of the Portuguese consul at Savannah; May 12, 1870. VII Richardson's Messages, p. 84.

3. By President Grant, under the Acts of Congress of January 7, 1824 (4 Stat. at L., p. 2), and of May 24, 1828 (4 Stat. at L., p. 308), suspending the discriminating duties on merchandise imported in Portuguese vessels from countries where it was not grown or manufactured; February 25, 1871. VII Richardson's Messages, p. 126.

4. By President Cleveland, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Portugal; July 20, 1893. IX Richardson's Messages, p. 398.

PRUSSIA.

Treaties and Convention.

(See also German Empire and North German Union.)

I. Treaty of Amity and Commerce.

Concluded September 10, 1785; ratifications exchanged October, 1786. 8 Stat. at L., p. 84; in French and English. U. S. Tr. and Con. 1889, p. 899.

This treaty of twenty-seven articles expired by its own limitations October, 1796, but Article XII was revived by Article XII of the treaty of 1828. (See U. S. Treaties in Force, 1899, p. 510.)

II. Treaty of Amity and Commerce.

Concluded July 11, 1799; proclaimed November 4, 1800. 8 Stat. at L., p. 162; in French and English. U. S. Tr. and Con. 1889, p. 907.

This treaty expired by its own limitations June 22, 1810; but the provisions of the articles mentioned hereunder were revived by Article XII of the treaty of May 1, 1828. See U. S. Treaties in Force, 1899, p. 510 for articles revived, as follows:

XIII. Detention of contraband goods.
XIV. Ship's papers in time of war.
XV. Visit to neutral ships.
XVI. Embargoes, seizures, etc.
XVII. Restoration of neutral ships.
XVIII. Asylum to vessels in distress.
XIX. Prizes.
XX. Letters of marque.
XXI. Rules in case of war with common enemy.
XXII. Mutual protection of ships against common enemy.
XXIII. Protection in case of war.
XXIV. Treatment of prisoners of war.

III. Treaty of Commerce and Navigation.

Concluded May 1, 1828; proclaimed March 14, 1829. 8 Stat. at L., p. 378; in French and English. U. S. Tr. and Con. 1889, p. 916. U. S. Treaties in Force, 1899, p. 45.

The sixteen articles are:

I. Freedom of commerce and navigation.
II. No discrimination of shipping charges.
III. No discrimination in import duties on account of vessels.
IV. Application of two preceding sections.
V. No discrimination of import duties.
VI. No discrimination of export duties.
VII. Coastwise trade.
VIII. No preference to importing vessel.
IX. Most favored nation commercial privileges.
X. Consular privileges and jurisdiction.
XI. Deserters from ships.

PRUSSIA.

XII. Articles of former treaties revived.	XIV. Estates of deceased parties.
XIII. Blockades.	XV. Duration.
	XVI. Ratification.

IV. EXTRADITION CONVENTION.

Concluded June 16, 1852; proclaimed June 1, 1853. 10 Stat. at L., Treaties p. 98; in German and English. U. S. Tr. and Con. 1889, p. 921. U. S. Treaties in Force, 1899, p. 520.

(This treaty was concluded by the King of Prussia for the Kingdom of Prussia and other States of the Germanic Confederation therein named. It was acceded to by the following German States: Bremen, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Schaumburg-Lippe, and Württemburg.)

The six articles are:

I. Extraditable crimes; procedure.	III. Nondelivery of citizens.
II. Accession of other German States.	IV. Persons under trial.
	V. Duration.
	VI. Ratification.

Proclamations.

The following proclamations concern the relations of the United States with Prussia:

1. By President Johnson, revoking the *exequaturs* of the former consuls for Hanover, Hesse, Nassau and Frankfort, at the request of Prussia to which such other independent governments had been united; December 19, 1866. VI Richardson's Messages, p. 511.

2. By President Grant, under the Act of Congress of June 11, 1864 (13 Stat. at L., p. 121), establishing Prussian consular courts under said act; February 10, 1870. VII Richardson's Messages, p. 84.

ROUMANIA.

Convention.

CONSULAR CONVENTION.

Concluded June 17, 1881; proclaimed July 9, 1883. 23 Stat. at L., p. 711. U. S. Tr. and Con. 1889, p. 925. U. S. Treaties in Force, 1899, p. 523.

The sixteen articles are:

I. Consular officers.	VIII. Vice-consuls and agents.
II. Most favored nation consular privileges.	IX. Applications to authorities.
	X. Notarial powers.
III. Exemptions.	XI. Shipping disputes.
IV. Testimony by consuls.	XII. Deserters from ships.
V. Arms and flags.	XIII. Damages to vessels at sea.
VI. Immunities of offices and archives.	XIV. Shipwrecks and salvage.
	XV. Estates of deceased persons.
VII. Acting officers.	XVI. Duration; ratification.

RUSSIA.

Treaties and Conventions.

I. Convention as to the Pacific Ocean and Northwest Coast of America.

Concluded April 17, 1824; proclaimed January 12, 1825. 8 Stat. at L., p. 302; in French and English. U. S. Tr. and Con. 1889, p. 931. U. S. Treaties in Force, 1899, p. 528.

(In both treaty volumes appears a translation from the original, which is in the French language.)

The six articles are:

I. Navigation, fishing, and trading.
II. Illicit trade.
III. Mutual limit of occupation of northwest coast.
IV. Temporary fishing and trading agreement.
V. Sale of liquors and firearms prohibited.
VI. Ratification.

II. Treaty of Commerce and Navigation.

Concluded December 18, 1832; proclaimed May 11, 1833. 8 Stat. at L., p. 444; in French and English. U. S. Tr. and Con. 1889, p. 933. U. S. Treaties in Force, 1899, p. 530.

The fourteen articles are:

I. Freedom of commerce and navigation.
II. Reciprocal treatment of vessels.
III. No discrimination on account of vessels importing.
IV. Application of two preceding articles.
V. Export duties.
VI. Import duties.
VII. Coastwise trade.
VIII. Consular officers and powers.
IX. Deserters from ships.
X. Estates of deceased persons.
XI. Most favored nation commercial privileges.
XII. Duration.
XIII. Ratification.
Separate article: Trade with Prussia, Sweden, Norway, Poland and Finland.

III. Convention as to Rights of Neutrals at Sea.

Concluded July 22, 1854; proclaimed November 1, 1854. 10 Stat. at L., Treaties p. 215; in French and English. U. S. Tr. and Con. 1889, p. 938. U. S Treaties in Force, 1899, p. 535.

The four articles are:

I. Principles of free ships and neutral property.
II. Extension of principles.
III. Accession of other nations.
IV. Ratification.

IV. Convention Ceding Alaska.

Concluded March 30, 1867; proclaimed June 20, 1867. 15 Stat. at L., p. 539; in French and English. U. S. Tr. and Con. 1889, p. 939. U. S. Treaties in Force, 1899, p. 537.

RUSSIA.

The seven articles are:

I. Territory ceded; boundaries.
II. Public property ceded.
III. Citizenship of inhabitants; uncivilized tribes.
IV. Formal delivery.
V. Withdrawal of troops.
VI. Payment; effect of cession.
VII. Ratification.

V. ADDITIONAL ARTICLE TO TREATY OF COMMERCE, 1832.

Concluded January 27, 1868; proclaimed October 15, 1868. 16 Stat. at L., p. 725; in French and English. U. S. Tr. and Con. 1889, p. 942. U. S. Treaties in Force, 1899, p. 540.

This additional article prohibited the counterfeiting of trade-marks and provided for their registration.

VI. TRADE-MARK DECLARATION.

Signed March 28, 1874; proclaimed November 24, 1874. 18 Stat. at L., Treaties p. 145. U. S. Tr. and Con. 1889, p. 943. U. S. Treaties in Force, 1899, p. 541.

This declaration gave the citizens of each country equal potection in the other with natives.

VII. DECLARATION.

Signed June 6, 1884. 23 Stat. at L., p. 789; in French and English. U. S. Tr. and Con. 1889, p. 943.

This declaration of two articles determined the method for the admeasurement of vessels in the ports of the respective countries.

VIII. EXTRADITION CONVENTION.

Concluded March 28, 1887; proclaimed June 5, 1893. 28 Stat. at L., p. 1071; in French and English. U. S. Treaties in Force, 1899, p. 541.

The eleven articles are:

I. Surrender of accused; evidence.
II. Extraditable crimes.
III. Political offenses.
IV. Nondelivery of citizens.
V. Persons under trial.
VI. Procedure.
VII. Provisional detention.
VIII. Articles taken with fugitives.
IX. Persons claimed by a third country.
X. Expenses.
XI. Duration; ratification.

IX. AGREEMENT FOR A MODUS VIVENDI IN RELATION TO THE FUR-SEAL FISHERIES IN BERING SEA AND THE NORTH PACIFIC OCEAN.

Concluded May 4, 1894; proclaimed May 12, 1894. 28 Stat. at L., p. 1202; in French and English. U. S. Treaties in Force, 1899, p. 545.

The five paragraphs are:

I. Sealing by United States citizens prohibited on Russian coasts.
II. Seizure of offending vessels.
III. Trials.
IV. Limit of catch on Russian islands.
V. Termination at will.

SALVADOR.

(Formerly San Salvador.)

Treaties and Conventions.

I. Convention of Amity, Navigation, and Commerce.

Concluded January 2, 1850; proclaimed April 18, 1853. 10 Stat. at L., Treaties, p. 71. U. S. Tr. and Con., 1889, p. 945.

This treaty of thirty-six articles was superseded by the Treaty of December 6, 1870. (See U. S. Treaties in Force, 1899, p. 547.)

II. Extradition Convention.

Concluded May 23, 1870; proclaimed March 4, 1874. 18 Stat. at L., Treaties p. 9, in Spanish and English. U. S. Tr. and Con. 1889, p. 955. U. S. Treaties in Force, 1899, p. 547.

(The Government of Salvador has given notice that this convention will terminate in 1904.)

The eight articles are:

I. Surrender of accused.	V. Nondelivery of citizens.
II. Extraditable crimes.	VI. Procedure.
III. Political offenses.	VII. Expenses.
IV. Persons under trial.	VIII. Duration; ratification.

III. Treaty of Amity, Commerce and Consular Privileges.

Concluded December 6, 1870; proclaimed March 13, 1874. 18 Stat. at L., Treaties p. 41; in Spanish and English. U. S. Tr. and Con. 1889, p. 957.

Upon notice from the Government of Salvador this general treaty of thirty-nine articles was abrogated May 30, 1893. (See U. S. Treaties in Force, 1899, p. 550.)

IV. Extradition Convention.

Concluded May 12, 1873; proclaimed March 4, 1874. 18 Stat. at L., Treaties p. 112; in Spanish and English.

This convention extended for one year the time for the exchange of ratifications of the Extradition Convention of May 23, 1870.

V. Convention of Amity, Commerce and Consular Privileges.

Concluded May 12, 1873; proclaimed March 13, 1874. 18 Stat. at L., Treaties p. 114; in Spanish and English.

The time for the exchange of ratifications of the treaty of December 6, 1870, was extended one year by this convention.

VI. Protocol.

Signed December 19, 1901.

This protocol submitted the claim of an American citizen against Salvador to arbitration.

Proclamations.

The following proclamations concern the relations of the United States with Salvador:

SALVADOR.

1. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Salvador in admitting certain articles free of duty and thus obtaining the reciprocity advantages under sec. 3 of said act; December 31, 1891. IX Richardson's Messages, p. 249.

2. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Salvador in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; December 27, 1892. IX Richardson's Messages, p. 365.

3. By President Cleveland, under the act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Salvador, and of hides from all parts of the world, November 8, 1895. IX Richardson's Messages, p. 593.

Diplomatic Correspondence.

By diplomatic correspondence in May, 1864, the claim of a citizen of the United States against Salvador was referred to a commission of three. Moore's History of International Arbitration, Vol. II, p. 1855.

SAMOAN ISLANDS.

Treaties and Conventions.

I. TREATY OF FRIENDSHIP AND COMMERCE.

Concluded January 17, 1878; proclaimed February 13, 1878. 20 Stat. at L., p. 704. U. S. Tr. and Con. 1889, p. 972. U. S. Treaties in Force, 1899, p. 551.

The eight articles are:

I. Friendship.
II. Privileges in Samoan ports.
III. Exemptions from duties.
IV. Judicial powers of consul.
V. Good offices of United States to adjust differences.
VI. Most favored nation privileges.
VII. Duration.
VIII. Ratification.

II. GENERAL ACT PROVIDING FOR THE NEUTRALITY AND AUTONOMOUS GOVERNMENT OF THE SAMOAN ISLANDS.

Concluded at Berlin June 14, 1889; proclaimed May 21, 1890. 26 Stat. at L., p. 1497. U. S. Treaties in Force, 1899, p. 553.

This treaty was between the United States, Great Britain and Germany.

Its eight articles are:

I. Declaration of the independence and neutrality of the islands.
II. Modification of existing treaties.
III. Establishment of supreme court of justice; jurisdiction.
IV. Settlement of land titles.
V. Municipal administration of Apia.
VI. Taxation and revenue.

VII. Sale of arms, ammunition, and intoxicating liquors.
VIII. General dispositions.

III. CLAIMS CONVENTION.

Concluded November 7, 1899; proclaimed March 8, 1900. 31 Stat. at L., p. 1875; in German and English.

This convention was between the United States, Germany and Great Britain, and in four articles it provided for the settlement by arbitration of claims for acts of military officers in Samoa.

IV. CONVENTION OF LIMITS.

Concluded December 2, 1899; proclaimed February 16, 1900. 31 Stat. at L., p. 1878; in German and English.

This convention was between the United States, Germany and Great Britain, and in four articles it determined the limits of the rights of each power in Samoa.

SARDINIA.

Treaty.

TREATY OF COMMERCE AND NAVIGATION.

Concluded November 26, 1838; proclaimed March 18, 1839. 8 Stat. at L., p. 512; in French and English. U. S. Tr. and Con. 1889, p. 974.

This treaty of twenty articles and a separate article was superseded by the treaty of 1871 with Italy, Sardinia having become merged into that Kingdom. (See U. S. Treaties at large, 1899, p. 566.)

SAXONY.

(See German Empire.)

Convention.

CONVENTION ABOLISHING DROIT D'AUBAINE AND EMIGRATION TAXES.

Concluded May 14, 1845; proclaimed September 9, 1846. 9 Stat. at L., Treaties p. 40; in German and English. U. S. Tr. and Con. 1889, p. 981. U. S. Treaties in Force, 1899, p. 567.

The seven articles are:

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Protection of rights of absent heirs.
V. Suits.
VI. Extent of treaty provisions.
VII. Ratification.

SCHAUMBURG-LIPPE.

(See German Empire and Prussia.)

Declaration.

DECLARATION OF ACCESSION.

Signed June 7, 1854; proclaimed July 26, 1854. 10 Stat. at L., Treaties p. 106. U. S. Tr. and Con. 1889, p. 983.

SCHAUMBURG-LIPPE.

The principality of Schaumburg-Lippe acceded to the Extradition Convention concluded with Prussia and other German States, June 16, 1852, and to the additional article of November 16, 1852.

SERBIA.

Conventions.

I. CONVENTION OF COMMERCE AND NAVIGATION.

Concluded October 14, 1881; proclaimed December 27, 1882. 22 Stat. at L., p. 963. U. S. Tr. and Con. 1889, p. 984. U. S. Treaties in Force, 1899, p. 569.

The fifteen articles are:

I. Freedom of commerce, navigation and trade.
II. Rights of real and personal property.
III. Trade privileges.
IV. Exemptions, etc.
V. Prohibitions of imports, etc., restricted.
VI. Import and export duties.
VII. Freedom of imports.
VIII. Transit of goods.
IX. Ad valorem duties.
X. Exceptions of local traffic.
XI. Freight on railways.
XII. Trade-marks.
XIII. Shipping charges.
XIV. Duration.
XV. Ratification.

II. CONSULAR CONVENTION.

Concluded October 14, 1881; proclaimed December 27, 1882. 22 Stat. at L., p. 968. U. S. Tr. and Con. 1889, p. 988. U. S. Treaties in Force, 1899, p. 573.

The thirteen articles are:

I. Consular officers.
II. Exequaturs.
III. Exemptions.
IV. Testimony by consular officers.
V. Arms and flag.
VI. Inviolability of archives and offices.
VII. Acting officers.
VIII. Vice-consuls and agents.
IX. Correspondence with authorities.
X. Notarial services.
XI. Estates of deceased persons.
XII. Surrender of certain privileges.
XIII. Duration; ratification.

SIAM.

Treaties and Conventions.

I. CONVENTION OF AMITY AND COMMERCE.

Concluded March 20, 1833; proclaimed June 24, 1837. 8 Stat. at L., p. 454. U. S. Tr. and Con. 1889, p. 992. U. S. Treaties in Force, 1899, p. 578.

The provisions of this treaty were modified by the treaty of 1856.

The ten articles are:

I. Peace.
II. Freedom of trade, etc.

III. Shipping duties in Siam.
IV. Most favored nation duties.
V. Shipwrecks.
VI. Settlement of debts.
VII. Trading in Siam.
VIII. Captures by pirates.
IX. Laws of Siam.
X. Consuls in Siam.

II. TREATY OF AMITY AND COMMERCE.

Concluded May 29, 1856; proclaimed August 16, 1858. 11 Stat. at L., p. 683. U. S. Tr. and Con. 1889, p. 995. U. S. Treaties in Force, 1899, p. 581.

The twelve articles are:

I. Amity; mutual assistance.
II. Consul at Bangkok; powers.
III. Offenses in Siam.
IV. Trade privileges in Siam.
V. Americans in Siam.
VI. Religious freedom, etc.
VII. Privileges to ships of war in Siam.
VIII. Duties; trade, etc.
IX. Treaty regulations.
X. Most favored nation privileges.
XI. Duration; revision.
XII. Ratification.

At foot of the treaty are printed the General Regulations, under which American Trade is to be conducted in Siam.

III. MODIFICATION TO TREATY OF AMITY AND COMMERCE OF MAY 29, 1856.

Concluded December 17–31, 1867; ratification advised by Senate July 25, 1868; ratified by the President August 11, 1868. 17 Stat. at L., p. 807. U. S. Tr. and Con. 1889, p. 1002. U. S. Treaties in Force, 1899, p. 588.

Article I of the treaty of 1856 is hereby modified.

IV. AGREEMENT REGULATING LIQUOR TRAFFIC IN SIAM.

Concluded May 14, 1884; proclaimed July 5, 1884. 23 Stat. at L., p. 782. U. S. Tr. and Con. 1889, p. 1003. U. S. Treaties in Force, 1899, p. 589.

The seven articles are:

I. Duties on liquors.
II. Testing of spirits.
III. Deleterious spirits.
IV. Licenses to sell.
V. Most favored nation privileges.
VI. Duration.
VII. Ratification, etc.

V. PROTOCOL.

Signed July 26, 1897. For. Rel. U. S., 1897, p. 479.

This protocol of seven articles refers the claim of a citizen of the United States against Siam to an arbitrator. For an account of the arbitration under this protocol, see Moore's History of International Arbitration, Vol. II, p. 1899.

Diplomatic Correspondence.

By correspondence a mixed commission was appointed to decide the claim of an American citizen against Siam. The commission gave its

award on September 30, 1897. See Moore's History of International Arbitration, Vol. II, p. 1862.

SPAIN.

Treaties and Conventions.

(The Treaty Volume of 1899 at p. 592, contains the statement that the treaties with Spain, prior to 1898, were annulled by the war of that date.)

I. TREATY OF FRIENDSHIP, BOUNDARIES, COMMERCE AND NAVIGATION.

Concluded October 27, 1795; proclaimed August 2, 1796. 8 Stat. at L., p. 138; in Spanish and English. U. S. Tr. and Con. 1889, p. 1006.

This treaty consisted of twenty-three articles. It contained an agreement as to the southern and western boundaries of the United States; the mutual free navigation of the Mississippi River from its source to the ocean; the usual articles relating to commerce and navigation; the authority to appoint consuls; the appointment of a claims commission to settle claims of United States citizens against Spain, etc. The claims commission provided for met in Philadelphia, terminating their duties December 31, 1799, having made awards to the amount of $325,440.07½ on account of Spanish spoliations. (See U. S. Treaties in Force, 1889, p. 592.) For an account of the proceedings of the commission, under Article XXI, see Moore's History of International Arbitration, Vol. II, p. 991.

II. CLAIMS CONVENTION.

Concluded August 11, 1802; proclaimed December 22, 1818. 8 Stat. at L., p. 198; in Spanish and English. U. S. Tr. and Con. 1889, p. 1015.

This convention provided for the appointment of a board of five commissions to adjust the claims for "indemnification of those who have sustained losses, damages, or injuries in consequence of the excesses of individuals of either nation during the late war contrary to the existing treaty or the laws of nations." As the convention was not proclaimed until the 22d of December, 1818, and was annulled by Article X of the treaty of 1819, it never went into effect. (See U. S. Treaties in Force, 1899, p. 592.)

III. TREATY OF FRIENDSHIP, CESSION OF THE FLORIDAS, AND BOUNDARIES.

Concluded February 22, 1819; proclaimed February 22, 1821. 8 Stat. at L., p. 252; in Spanish and English. U. S. Tr. and Con. 1889, p. 1016.

By this treaty of sixteen articles Spain ceded East and West Florida to the United States; the western boundary was agreed to in Article III; mutual claims against both governments were renounced, the United States assuming the payment of the Spanish claims arising out of the operations of the American army in Florida; a commission was provided to adjust the claims against Spain for the satisfaction of which

the United States agreed to pay an amount not exceeding $5,000,000, etc. The claims commission under the treaty, which was authorized by the act of March 3, 1821 (3 Stat. at L., p. 639), met in Washington, June 9, 1824. The awards amounted to $5,454,545.13, which, in accordance with the treaty provisions, was scaled down to $5,000,000. (See U. S. Treaties in Force, 1899, p. 593.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. V, pp. 4487, *et seq.* For the settlement of the claims under Article IX of this treaty, see Moore's History of International Arbitration, Vol. V, p. 4519.

IV. Claims Convention.

Concluded February 17, 1834; proclaimed November 1, 1834. 8 Stat. at L., p. 460; in Spanish and English. U. S. Tr. and Con. 1889, p. 1035.

In this convention Spain agreed to pay interest at the rate of 5 per centum per annum on 12,000,000 of rials vellon as the balance due to the citizens of the United States for claims against Spain. The commission to determine the claims under the convention, authorized by act of Congress June 7, 1836 (5 Stat. at L., p. 34), met in Washington July 31, 1836, and adjourned January 31, 1838, awarding $549,850.28 to the claimants. The payment of the interest is made perpetual by the convention. (See U. S. Treaties in Force, 1899, p. 594.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. V, p. 4533.

V. Claims Agreement.

Signed February 12, 1871. 17 Stat. at L., p. 839. U. S. Tr. and Con., 1889, p. 1025.

This agreement contains seven articles, which provide for the formation of a mixed commission to determine the claims of citizens of the United States against Spain for injuries inflicted during the "Ten years' war" in Cuba. (See note 2 to § 463, Vol. II, p. 371.) For an account of the proceedings of this Commission, see Moore's History of International Arbitration, Vol. II, p. 1019.

VI. Agreement.

Signed February 27, 1875. For. Rel. U. S. 1875, p. 1250.

By this agreement of four articles Spain agreed to pay to the United States $80,000 in settlement of all claims against Spain by the survivors of, or the relatives of, the crew or passengers of the "*Virginius.*"

VII. Extradition Convention.

Concluded January 5, 1877; proclaimed February 21, 1877. 19 Stat. at L., Treaties p. 94; in Spanish and English. U. S. Tr. and Con. 1889, p. 1027.

This convention of twelve articles contained the usual provisions for the extradition of fugitives from justice.

SPAIN.

VIII. PROTOCOL.

Signed January 12, 1877. 19 Stat. at L. Treaties p. 100. U. S. Tr. and Con., 1889, p. 1030.

This protocol determined the judicial procedure to be observed in each country in a criminal trial of a citizen or subject of the other.

IX. AGREEMENT.

Concluded February 23, 1881. U. S. Tr. and Con., 1889, p. 1032.

This agreement terminated the claims commission formed by the agreement of 1871.

X. AGREEMENT.

Signed May 6, 1882. 22 Stat. at L., p. 915; and 23 Stat. at L., p. 717; in Spanish and English. U. S. Tr. and Con. 1889, p. 1034.

This protocol or agreement extended the duration of the claims commission established under the agreement of 1871.

XI. TRADE-MARK CONVENTION.

Concluded June 19, 1882; proclaimed April 19, 1883. 22 Stat. at L., p. 979; in Spanish and English. U. S. Tr. and Con. 1889, p. 1036.

This convention of three articles contained the usual reciprocal agreements for the protection of trade-marks and manufactured articles.

XII. SUPPLEMENTARY EXTRADITION CONVENTION.

Concluded August 7, 1882; proclaimed April 19, 1883. 22 Stat. at L., p. 991; in Spanish and English. U. S. Tr. and Con. 1889, p. 1037.

By the articles of this supplementary convention to the extradition convention of 1877, additions were made to the list of extraditable offenses, and an agreement made for the temporary detention of criminals and for the coöperation of both governments to secure the arrest and delivery of the criminals demanded.

XIII. AGREEMENT.

Signed June 2, 1883. 23 Stat. at L., p. 732; in Spanish and English.

This agreement of five articles arranged for the formal closing of the claims commission established by the protocol of 1871.

XIV. AGREEMENT.

Signed February 13, 1884. 23 Stat. at L., p. 750; in Spanish and English. U. S. Tr. and Con. 1889, p. 1039.

This agreement of four articles abolishes certain discriminating duties in Cuba and Porto Rico.

XV. AGREEMENT.

Signed October 27, 1886; proclaimed October 27, 1886. U. S. Tr. and Con. 1889, p 1203.

This agreement reciprocally suspended discriminating duties in Cuba, Porto Rico and the United States.

SPAIN.

XVI. AGREEMENT.

Signed September 21, 1887. U. S. Tr. and Con. 1889, p. 1204.

This agreement reciprocally suspended all tonnage duties or imposts in the United States and Spain.

XVII. PROTOCOL.

Signed August 12, 1898. 30 Stat. at L., p. 1742; in Spanish and English.

The full text of this protocol is given in INSULAR CASES APPENDIX, Vol. I, p. 507.

XVIII. TREATY OF PEACE.

Concluded December 10, 1898; proclaimed April 11, 1899. 30 Stat. at L., p. 1754; in Spanish and English. U. S. Treaties in Force, 1899, p. 595.

The full text of this treaty is given in INSULAR CASES APPENDIX, Vol. I, pp. 508, *et seq.*

XIX. PROTOCOL.

Signed March 29, 1900; proclaimed April 28, 1900. 31 Stat. at L., p. 1881; in Spanish and English.

This proctocol extends the time limit of Article IX of the treaty of 1898 as to the Philippines.

XX. TREATY OF CESSION.

Signed November 7, 1900; proclaimed March 23, 1901. 31 Stat. at L., p. 1942; in Spanish and English.

This treaty in one article extends the cession by Spain of the Philippines in consideration of the payment of $100,000.

Proclamations.

The following proclamations concern the relations of the United States with Spain:

1. By President Madison, appointing a governor to take possession of a part of the Louisiana Territory which had remained until that time under Spanish authority; October 27, 1810. I Richardson's Messages, p. 480.

2. By President Taylor, revoking the *exequatur* of the Spanish consul at New Orleans; January 4, 1850. V Richardson's Messages, p. 50.

3. By President Grant, under the Acts of Congress of January 7, 1824 (4 Stat. at L., p. 2) and of May 24, 1828 (4 Stat. at L., p. 308), abolishing discriminating duties on merchandise imported in Spanish vessels from all countries except Cuba and Porto Rico; December 19, 1871. VIII Richardson's Messages, p. 174.

4. By President Arthur, under sec. 4228 of the Revised Statutes, suspending customs duties on articles imported from Cuba and Porto Rico; February 14, 1884. VIII Richardson's Messages, p. 223.

5. By President Arthur, under the Act of Congress of June 26, 1884

(23 Stat. at L., p. 53), suspending the tonnage duty on vessels arriving from San Juan and Mayaguez in Porto Rico; January 31, 1885. VIII Richardson's Messages, p. 284.

6. By President Cleveland, under sec. 4228 of the Revised Statutes, revoking the proclamation of February 14, 1884; October 13, 1886. VIII Richardson's Messages, p. 489.

7. By President Cleveland, under sec. 4228 of the Revised Statutes, suspending discriminating duties of tonnage and impost on Spanish vessels and their merchandise imported from Cuba and Porto Rico or any foreign country; October 27, 1886. VIII Richardson's Messages, p. 490.

8. By President Cleveland, under sec. 4228 of the Revised Statutes, suspending discriminating duties of tonnage and impost on Spanish vessels and merchandise imported in them from any country; September 21, 1887. VIII Richardson's Messages, p. 570.

9. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612), announcing the action of Spain in admitting certain articles free of duty into Cuba and Porto Rico and thus obtaining the reciprocity advantages under sec. 3 of said act; July 31, 1891. IX Richardson's Messages, p. 148.

10. By President Cleveland, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the subjects of Spain; July 10, 1895. IX Richardson's Messages, p. 592.

11. By President McKinley, announcing a blockade of the Island of Cuba; April 22, 1898. 30 Stat. at L., p. 1769. X Richardson's Messages, p. 202.

12. By President McKinley, declaring certain principles to be observed in the war with Spain concerning neutral flags and goods, blockades, arrival of Spanish vessels at, and departure from, the United States, and the right of search; April 26, 1898. 30 Stat. at L., p. 1770. X Richardson's Messages, p. 204.

13. By President McKinley, enlarging the blockade of Cuba and extending it to San Juan, Porto Rico; June 27, 1898. 30 Stat. at L., p. 1776. X Richardson's Messages, p. 206.

14. By President McKinley, under the protocol of August 12, 1898, (given in full in INSULAR CASES APPENDIX, Vol. I), directing a suspension of hostilities in the war with Spain; August 12, 1898. 30 Stat. at L., p. 1780.

For the proclamations of neutrelity by other nations during the war between the United States and Spain, see For. Rel. U. S., 1898, pp. 841 *et seq.*

Diplomatic Correspondence.

1. The case of the vessel Colonel Lloyd Aspinwall was referred to two arbitrators by diplomatic correspondence, May 25–June 16, 1870. S. Ex. Doc. 108, 41 Cong. 2d. Sess. For an account of this case, see Moore's History of International Arbitration, Vol. II, p. 1007.

2. By letters in January, 1885, the claim of an American citizen against Spain was referred to an arbitrator. For. Rel. U. S. 1885, p. 683. For

an account of the arbitration under this agreement, see Moore's History of International Arbitration, Vol. II, p. 1055.

3. By letters signed January 10 and 11, 1885, a *modus vivendi* establishing the most favored nation privileges as to customs dues was concluded. For. Rel. U. S. 1894, p. 632.

SWEDEN.

Treaty.

Treaty of Amity and Commerce.

Concluded April 3, 1783; proclaimed by the Continental Congress September 25, 1783. 8 Stat at L., p. 60; in French and English. U. S. Tr. and Con. 1889, p. 1042.

This treaty terminated by its own limitations in 1796; the articles revived by the treaty of 1816, and by Article XVII of the treaty of 1827, are printed in U. S. Treaties in Force, 1899, p. 601.

The twenty-seven articles and the separate article are:

I. (Peace and friendship.)
II. Most favored nation privileges.
III. (Privileges to Swedish subjects in United States.)
IV. (Privileges to United States citizens in Sweden.)
V. Religious freedom.
VI. Effects of deceased persons.
VII. Commerce in case of war.
VIII. Extent of freedom of commerce.
IX. Contraband goods.
X. Goods not contraband.
XI. Ships' papers in case of war.
XII. Navigation in time of war.
XIII. Detention of contraband goods, etc.
XIV. Goods on enemy's ships.
XV. Instructions to naval vessels.
XVI. Bond from privateers.
XVII. Recaptured ships; embargoes.
XVIII. Regulations for war with common enemy.
XIX. Prizes.
XX. (Shipwrecks.)
XXI. Asylum for ships in distress.
XXII. Property rights in case of war.
XXIII. Letters of marque.
XXIV. (Shipping privileges.)
XXV. Visit of war vessels.
XXVI. (Consuls.)
XXVII. Ratification.
Separate article. Duration.

Separate Articles.

I. Defense of ships in Sweden.
II. Defense of ships in United States.
III. (Mutual protection of merchant vessels.)
IV. Right to trade.
V. Freedom of vessels from search.

Proclamation.

The following proclamation concerns the relations of the United States with Sweden:

SWEDEN.

By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Sweden, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

SWEDEN AND NORWAY.

(See also Norway.)

Treaties and Conventions.

I. Treaty of Amity and Commerce.

Concluded September 4, 1816; proclaimed December 31, 1818. 8 Stat. at. L., p. 232; in French and English. U. S. Tr. and Con. 1889, p. 1053.

This treaty of fourteen articles expired by its own limitations September 25, 1826, and was replaced by the treaty of 1827. (See U. S. Treaties in Force, 1899, p. 611.)

II. Treaty of Commerce and Navigation.

Concluded July 4, 1827; proclaimed January 19, 1828. 8 Stat. at L., p. 346; in French and English. U. S. Tr. and Con. 1889, p. 1058. U. S. Treaties in Force, 1899, p. 611.

The twenty articles are:

I. Freedom of commerce and trade.
II. Shipping dues.
III. No discrimination on imports.
IV. No discrimination on exports.
V. Trade with St. Bartholomew.
VI. Coastwise trade.
VII. No discrimination in purchases.
VIII. Tonnage, etc., dues.
IX. No restriction on imports.
X. Transit privileges, bounties, etc.
XI. Shipping privileges.
XII. Discharge of cargoes.
XIII. Consular officers and powers.
XIV. Deserters from ships.
XV. Shipwrecks.
XVI. Quarantine.
XVII. Articles of former treaty revived.
XVIII. Blockade rules.
XIX. Duration.
XX. Ratification.
Separate article. Trade with Finland.

III. Extradition Convention.

Concluded March 21, 1860; proclaimed December 21, 1860. 12 Stat. at L., p. 1125. U. S. Tr and Con. 1889, p. 1066.

This treaty of seven articles was concluded between the United States and Sweden and Norway. It was superseded as to Norway December 8, 1893, by the treaty of June 7, 1893, and as to Sweden April 17, 1893, by the treaty of January 14, 1893. (See U. S. Treaties in Force, 1899, p. 618.)

SWEDEN AND NORWAY.

IV. NATURALIZATION CONVENTION.

Concluded May 26, 1869; proclaimed January 12, 1872. 17 Stat. at L., p. 809; in Swedish and English. U. S. Tr. and Con. 1889, p. 1068. U. S. Treaties in Force, 1899, p. 619.

The six articles are:

I. Recognition of naturalization.
II. Liability for prior offenses.
III. Restoration to former citizenship.
IV. Extradition convention continued.
V. Duration.
VI. Ratification.
Protocol.

V. EXTRADITION TREATY.

Concluded January 14, 1893; proclaimed March 18, 1893. 27 Stat. at L., p. 972. U. S. Treaties in Force, 1899, p. 621.

The twelve articles are:

I. Surrender of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitation.
VIII. Restrictions on trials.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses.
XII. Effect; ratification.

Proclamations.

The following proclamations concern the relations of the United States with Sweden and Norway:

1. By President Johnson revoking the *exequaturs* of the consuls for Sweden and Norway at New York and New Orleans, respectively; March 26, 1866. VI Richardson's Messages, pp. 428 and 429.

2. By President Johnson annulling the preceding revocation; May 30, 1866. VI Richardson's Messages, p. 432.

3. By President Grant, under the Act of Congress of June 11, 1864 (13 Stat. at L., p. 121), establishing consular courts of Sweden and Norway under said act; May 11, 1872. VII Richardson's Messages, p. 175.

SWITZERLAND.

(Swiss Confederation.)

Treaty and Conventions.

I. CONVENTION AS TO PROPERTY RIGHTS.

Concluded May 18, 1847; proclaimed May 4, 1848. 9 Stat. at L., Treaties p. 100; in French and English. U. S. Tr. and Con. 1889, p. 1071.

This convention of three articles is superseded by the Convention of 1850. (See U. S. Treaties in Force, 1899, p. 626.)

SWITZERLAND.

II. CONVENTION OF FRIENDSHIP, COMMERCE AND EXTRADITION.

Concluded November 25, 1850; proclaimed November 9, 1855. 11 Stat. at L., p. 587; in French and English. U. S. Tr. and Con. 1889, p. 1072. U. S. Treaties in Force, 1899, p. 626.

The nineteen articles are as follows:

I. Personal and property privileges.
II. Civil duties and immunities.
III. Return of citizens.
IV. Passports.
V. Real and personal property rights.
VI. Civil suits.
VII. Consular officers and privileges.
VIII. Most favored nation commercial privileges.
IX. Export and import duties.
X. Future commercial privileges.
XI. Differential duties.
XII. Shipping; shipwrecks.
XIII. Extradition of accused.
XIV. Extraditable crimes.
XV. Mutual surrender.
XVI. Expenses.
XVII. Political offenses.
XVIII. Duration.
XIX. Ratification.

III. EXTRADITION TREATY.

Signed May 14, 1900; proclaimed February 28, 1901. 31 Stat. at L., p. 1928; in French and English.

The fourteen articles are:

I. Extradition.
II. Extraditable offenses.
III. Accessories extraditable.
IV. Special court.
V. Procedure.
VI. Provisional arrest.
VII. Political crimes excepted.
VIII. Limitations.
IX. Prosecution only for extradited crime.
X. Deferring extradition.
XI. Persons claimed by two or more countries.
XII. Disposition of articles seized.
XIII. Expenses.
XIV. Repeal of certain articles of treaty of 1850.

Proclamation.

The following proclamation concerns the relations of the United States with Switzerland:

By President Benjamin Harrison, under the Act of Congress of March 3, 1891 (26 Stat. at L., p. 1106), granting the benefit of the copyright laws to the citizens of Switzerland; July 1, 1891. IX Richardson's Messages, p. 147.

Diplomatic Correspondence.

By correspondence dated April 27, and May 14, 1883, (published in leaflet by the State Department) a reciprocal registration of trademarks, under the Act of Congress of March 3, 1881 (21 Stat. at L., p. 502), was established.

TEXAS.

Conventions.

The admission of Texas into the United States, December 29, 1845, rendered the treaties concluded in 1838, obsolete.

I. Claims Convention.

Concluded April 11, 1838; proclaimed July 6, 1838. 8 Stat. at L., p. 510. U. S. Tr. and Con. 1889, p. 1078.

By this treaty Texas agreed to pay $11,750 in settlement of claims of citizens of the United States for the capture of the brigs *Pocket* and *Durango*, and other injuries.

II. Boundary Convention.

Concluded April 25, 1838; proclaimed October 13, 1838. 8 Stat. at L., p. 511. U. S. Tr. and Con. 1889, p. 1079.

This treaty provided for a commission to survey and mark the boundary between the United States and Texas.

Proclamation.

The following proclamation concerns the relations of the United States with Texas:

By President Fillmore, under the Act of Congress of September 9, 1850 (9 Stat. at L., p. 446), setting forth the northern and western boundaries of Texas as described in said act; December 13, 1850. V Richardson's Messages, p. 107.

TONGA.

Treaty.

Treaty of Amity, Commerce and Navigation.

Concluded October 2, 1886; proclaimed September 18, 1888. 25 Stat. at L., p. 1440. U. S. Tr. and Con. 1889, p. 1205. U. S. Treaties in Force, 1899, p. 633.

The fifteen articles are:

I. Amity.
II. Most favored nation privileges.
III. Trade privileges.
IV. Commerce and navigation; imports.
V. Shipping charges.
VI. Coaling station in Tonga.
VII. Privileges to steam mail ships.
VIII. Whaling and fishing ships.
IX. Personal exemptions.
X. Deserters from ships.
XI. Consular officers.
XII. Consular jurisdiction.
XIII. Religious freedom.
XIV. Duration.
XV. Ratification.

TRIPOLI.

Treaty.

I. Treaty of Peace and Friendship.

Concluded November 4, 1796; proclaimed June 10, 1797. 8 Stat. at L., p. 154. U. S. Tr. and Con. 1889, p. 1081.

This treaty of twelve articles was superseded by the treaty of 1805. (See U. S. Treaties in Force, 1899, p. 637.)

II. Treaty of Peace and Amity.

Concluded June 4, 1805; proclaimed (?). 8 Stat. at L., p. 214. U. S. Tr. and Con. 1889, p. 1084. U. S. Treaties in Force, 1899, p. 637.

The twenty articles are:

I. Peace, friendship, and commerce.
II. Exchange of prisoners.
III. Withdrawal of United States forces.
IV. Neutral rights.
V. Liberation of captive citizens.
VI. Ships' passports.
VII. Purchase of prizes.
VIII. Asylum for supplies.
IX. Shipwrecks.
X. Assistance to vessels in territorial waters.
XI. Most favored nation commercial privileges.
XII. Consular responsibility in Tripoli.
XIII. Salutes to naval vessels.
XIV. Religious freedom, etc.
XV. Settlement of disputes.
XVI. Treatment of prisoners.
XVII. Captured vessels.
XVIII. Judicial power of consul.
XIX. Homicides, etc.
XX. Estates of deceased persons; ratification.

TUSCANY.

Proclamation.

The following proclamation concerns the relations of the United States with Tuscany:

By President Jackson, under the Act of Congress of May 24, 1828 (4 Stat. at L., p. 308), removing discriminating duties of tonnage and impost from vessels and merchandise of Tuscany; September 1, 1836. III Richardson's Messages, p. 233.

TUNIS.

Treaty and Convention.

I. Treaty of Amity, Commerce and Navigation.

Concluded August, 1797. 8 Stat. at L., p. 157. U. S. Tr. and Con. 1889, p. 1090. U. S. Treaties in Force, 1899, p. 643.

TUNIS.

The twenty-three articles are:

I. Amity.
II. Restoration of property captured.
III. Rights of vessels.
IV. Ships' passports.
V. Ships under convoy.
VI. Search of ships.
VII. Vessels purchased.
VIII. Asylum for supplies and shelter.
IX. Shipwrecks.
X. Protection of ships in territorial waters.
XI. Salutes to naval vessels.
XII. Trading rights and privileges.
XIII. Enemies' subjects serving as sailors.
XIV. Import duties.
XV. Freedom of commerce; prohibitions.
XVI. Anchorage charges.
XVII. Consuls.
XVIII. Responsibility for debts.
XIX. Effects of deceased persons.
XX. Jurisdiction of consuls.
XXI. Homicides, etc.
XXII. Civil suits.
XXIII. Settlement of disputes.

II. CONVENTION AMENDING TREATY OF AUGUST, 1797.

Concluded February 24, 1824; proclaimed January 21, 1825. 8 Stat. at L., p. 298. U. S. Tr. and Con. 1889, p. 1096. U. S. Treaties in Force, 1899, p. 648, reprinted from the proclamation of President Monroe.

This treaty consists of reprints of four articles of the treaty of 1797, altered as follows:

VI. Search of ships; freedom of slaves.
XI. Salutes to naval vessels.
XII. Trading rights and privileges.
XIV. Most favored nation commercial privileges.

TURKEY.

(See Ottoman Empire.)

TWO SICILIES.

(See Italy.)

Treaties and Conventions.

I. CLAIMS CONVENTION.

Concluded October 14, 1832; proclaimed August 27, 1833. 8 Stat. at L., p. 442; in Italian and English. U. S. Tr. and Con. 1889, p. 1100.

This convention of three articles provided for the payment of 2,115,000 Neapolitan ducats for the seizure, etc., of United States vessels by Murat in 1809, 1810, 1811 and 1812. The commission of three to decide on the distribution of the indemnity met in Washington September, 1833, and adjourned March 17, 1835. The awards of the commission

TWO SICILIES.

amounted to $1,925,034.68. (See U. S. Treaties in Force, 1899, p. 652. For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. V, p. 4575.

II. AGREEMENT.

Concluded December 26, 1835. U. S. Tr. and Con. 1889, p. 1101.

This agreement provided for the payment of the balance due under the foregoing convention.

III. TREATY OF COMMERCE AND NAVIGATION.

Concluded December 1, 1845; proclaimed July 24, 1846. 9 Stat. at L., Treaties p. 13; in Italian and English. U. S. Tr. and Con. 1889, p. 1102.

This treaty of thirteen articles was superseded by the Convention of October 1, 1855. (See U. S. Treaties in Force, 1899, p. 652.)

IV. CONVENTION AS TO RIGHTS OF NEUTRALS AT SEA.

Concluded January 13, 1855; proclaimed July 16, 1855. 11 Stat. at L., p. 607; in Italian and English. U. S. Tr. and Con. 1889, p. 1107.

This convention of three articles was superseded by the treaty of 1871 with Italy. (See U. S. Treaties in Force, 1899, p. 652.)

V. CONVENTION OF AMITY, COMMERCE AND NAVIGATION AND EXTRADITION.

Concluded October 1, 1855; proclaimed December 10, 1856. 11 Stat. at L., p. 639; in Italian and English. U. S. Tr. and Con. 1889, p. 1109.

This convention became obsolete by the consolidation of the two Sicilies with the Kingdom of Italy, 1861. See treaties of 1868 and 1871 with Italy. (See U. S. Treaties in Force, 1899, p. 653.)

URAGUAY.

Proclamation.

The following proclamation concerns the relations of the United States with Uraguay:

By President Cleveland, under the Act of Congress March 2, 1895, (28 Stat. at L., p. 727, 733), suspending the prohibition of the importation of cattle from Uraguay, and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

VENEZUELA.

Treaties and Conventions.

I. TREATY OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded January 20, 1836; proclaimed June 30, 1836. 8 Stat. at L., p. 466; in Spanish and English. U. S. Tr. and Con. 1889, p. 1119.

VENEZUELA.

Pursuant to a notice from the Government of Venezuela, this convention of thirty-four articles terminated January 3, 1851. (See U. S. Treaties in Force, 1899, p. 654.)

II. AGREEMENT.

Signed May 1, 1852. Published in leaflet by the State Department.

This agreement of three articles provides for the payment by Venezuela of $90,000 in settlement of specified claims of American citizens.

III. CLAIMS CONVENTION.

Concluded January 14, 1859; 17 Stat. at L., p. 803; in Spanish and English. U. S. Tr. and Con. 1889, p. 1129.

By this convention the claims of United States citizens against Venezuela, amounting to $130,000, for damages for being evicted from Aves Island were acknowledged and payment provided for.

IV. TREATY OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded August 27, 1860; proclaimed September 25, 1861. 12 Stat. at L., p. 1143; in Spanish and English. U. S. Tr. and Con. 1889, p. 1130.

This treaty of thirty-two articles terminated October 22, 1870, pursuant to notice from Venezuela. (See U. S. Treaties in Force, 1899, p. 654.)

V. CLAIMS CONVENTION.

Concluded April 25, 1866; proclaimed May 29, 1867. 16 Stat. at L., p. 713; in Spanish and English. U. S. Tr. and Con. 1889, p. 1140.

The claims of citizens of the United States against Venezuela were submitted by this convention to two commissioners and an umpire, who met at Caracas, Venezuela, August 30, 1867, and adjourned August 3, 1868, awarding $1,253,310.30 against Venezuela. (See U. S. Treaties in Force, 1899, p. 654.)

VI. CLAIMS CONVENTION.

Concluded December 5, 1885; proclaimed June 4, 1889. 28 Stat. at L., p. 1053; in Spanish and English.

VII. CONVENTION TO REMOVE DOUBTS AS TO MEANING OF THE CONVENTION OF 1885.

Concluded March 15, 1888; proclaimed June 4, 1889. 28 Stat. at L., p. 1064; in Spanish and English.

VIII. CONVENTION EXTENDING THE TIME FOR RATIFICATION OF THE CONVENTION OF 1885.

Concluded October 5, 1888; proclaimed June 4, 1889. 28 Stat. at L., p. 1067; in Spanish and English.

The commission authorized by this and the two previous conventions to reopen and decide the awards under the treaty of 1866, was organized

in Washington, D. C., September 3, 1889, and adjourned September 2, 1890, awarding claims against Venezuela amounting to $980,572.60. (See U. S. Treaties in Force, 1899, p. 655.) For an account of the arbitration under these four conventions, see Moore's History of International Arbitration, Vol. II, p. 1659.

IX. Claims Convention.

Concluded January 19, 1892; proclaimed July 30, 1894. 28 Stat. at L., p. 1183; in Spanish and English.

By this convention the claim of the Venezuelan Steam Transportation Company against Venezuela was referred to the arbitration of two commissioners and an umpire, who rendered an award of $141,800. (See U. S. Treaties in Force, 1899, p. 655.) For an account of the proceedings of this commission, see Moore's History of International Arbitration, Vol. II, p. 1693.

Proclamations.

The following proclamations concern the relations of the United States with Venezuela:

1. By President Benjamin Harrison, under the Act of Congress of October 1, 1890 (26 Stat. at L., p. 567, 612) announcing the action of Venezuela in admitting certain articles free of duty, and thus obtaining the reciprocity advantages under sec. 3 of said act; March 15, 1892. IX Richardson's Messages, p. 268.

2. By President Cleveland, under the Act of Congress of March 2, 1895 (28 Stat at L., p. 727, 733), suspending the prohibition of the importation of cattle from Venezuela and of hides from all parts of the world; November 8, 1895. IX Richardson's Messages, p. 593.

WÜRTTEMBERG.

(See German Empire and Prussia.)

Treaties and Conventions.

I. Convention Abolishing Droit d'Aubaine and Taxes on Emigration.

Concluded April 10, 1844; proclaimed December 16, 1844. 8 Stat. at L., p. 588; in German and English. U. S. Tr. and Con. 1889, p. 1144. U. S. Treaties in Force, 1899, p. 656.

The seven articles are:

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Property of absent heirs.
V. Civil suits.
VI. Extent of convention.
VII. Ratification.

WÜRTTEMBERG.

II. DECLARATION OF ACCESSION.

Signed October 13, 1853; proclaimed December 27, 1853. 10 Stat. at L., Treaties p. 105. U. S. Tr. and Con. 1889, p. 1146.

Württemberg acceded to the extradition treaty of 1852 with Prussia and the States of the Germanic Confederation.

III. CONVENTION AS TO NATURALIZATION AND EXTRADITION.

Concluded July 27, 1868; proclaimed March 7, 1870. 16 Stat. at L., p. 735; in German and English. U. S. Tr. and Con. 1889, p. 1146. U. S. Treaties in Force, 1899, p. 658.

The six articles are:

I. Naturalization recognized.
II. Liability for prior offenses.
III. Extradition treaty renewed.
IV. Renunciation of naturalization.
V. Duration.
VI. Ratification.

See also protocol explanatory of terms used in the treaty (printed at foot of treaty in both treaty volumes.)

ZANZIBAR.

(See Muscat.)

Treaty.

TREATY AS TO DUTIES ON LIQUORS AND CONSULAR POWERS.

Concluded July 3, 1886; proclaimed August 17, 1888. 25 Stat. at L., p. 1438. U. S. Tr. and Con. 1889, p. 1209. U. S. Treaties in Force, 1889, p. 661.

The three articles are:

I. Duty on liquors.
II. Consular powers.
III. Ratification.

INTERNATIONAL CONVENTIONS AND ACTS TO WHICH THE UNITED STATES IS A PARTY.

I. Amelioration of the Condition of the Wounded in Time of War.

Concluded at Geneva, Switzerland, August 22, 1864; ratifications exchanged by original signatories June 22, 1865; adhesion accepted by the Swiss Confederation June 9, 1882; proclaimed July 26, 1882. 22 Stat. at L., p. 940; in French and English. U. S. Tr. and Con. 1889, p. 1150. U. S. Treaties in Force, 1899, p. 665.

(The President's ratification of the act of accession, as transmitted to Berne and exchanged for the ratifications of the other signatory and adhesory powers, embraces the French text of the convention of August 22, 1864, and the additional articles of October 20, 1868. The French text is, therefore, for all international purposes, the standard one.

The adhesion of the following States has been communicated: Sweden, December 13, 1864; Greece, January 5–17, 1865; Great Britain, February 18, 1865; Mecklenburg-Schwerin, March 9, 1865; Turkey, July 5, 1865; Württemberg, June 2, 1866; Hesse, June 22, 1866; Bavaria, June 30, 1866; Austria, July 21, 1866; Russia, May 10–22, 1867; Persia, December 5, 1874; Roumania, November 18–30, 1874; Salvador, December 30, 1874; Montenegro, November 17–29, 1875; Servia, March 24, 1879; Bolivia, October 16, 1879; Chili, November 15, 1879; Argentine Republic, November 25, 1879; Peru, April 22, 1880. As given in U. S. Treaties in Force, 1899, p. 665.)

The ten articles are:

I. Neutrality of ambulances and hospitals.
II. Neutrality of hospital employees.
III. Extent of neutrality.
IV. Equipment.
V. Neutrality of persons caring for the wounded.
VI. Care of sick and wounded; evacuations.
VII. Flag and arm-badge.
VIII. Regulation of details of execution.
IX. Accession of other countries.
X. Ratification.

In the proclamation of the foregoing convention and following it in each of the treaty volumes are fifteen additional articles which have never been ratified by the signatory parties.

II. International Bureau of Weights and Measures.

Concluded May 20, 1875; proclaimed September 27, 1878. 20 Stat. at L., p. 709; in French and English. U. S. Tr. and Con. 1889, p. 1157. U. S. Treaties in Force, 1899, p. 673.

(The treaty submitted to the Senate and attached to the proclamation is in the French language. The text printed in the treaty volumes is from a translation made in the Department of State. Following the treaty are twenty-two regulations and six transient provisions.)

The fourteen articles are:

I. International Bureau of Weights and Measures established.
II. Special building.
III. International committee.
IV. General conferences.
V. Regulations.
VI. Duties of the bureau.
VII. Bureau officials.
VIII. Prototypes of meter and kilogram.
IX. Expenses.
X. Contributions.
XI. Contributions from acceding countries.
XII. Future modifications.
XIII. Duration.
XIV. Ratification.

III. Convention for International Protection of Industrial Property.

Concluded March 20, 1883; accession announced to Swiss Confederation May 30, 1887; proclaimed June 11, 1887. 25 Stat. at L., p. 1372; in French and English. U. S. Tr. and Con. 1889, p. 1168. U. S. Treaties in Force, 1899, p. 684.

(The text in both treaty volumes is reprinted from the proclamation of the President, the original Convention being in the French language.)

The nineteen articles are:

I. Union for protection of industrial property formed.
II. Mutual protection of patents, trade-marks, and commercial names.
III. Protection of alien residents.
IV. Protection to applicants.
V. Introduction by patentee of articles patented in other countries.
VI. Deposit of trade-marks.
VII. Articles protected.
VIII. Commercial names protected.
IX. Seizure of unlawfully marked goods.
X. Articles with false place of origin.
XI. Temporary protection to articles at expositions.
XII. Central depot of information.
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XIV. International conferences.
XV. Special diplomatic conventions.
XVI. Adhesion of other States.
XVII. Laws to be enacted.
XVIII. Duration.
XIX. Ratification.
Protocol.

IV. Supplementary Convention.

Concluded April 15, 1891; proclaimed June 22, 1892. 27 Stat. at L., p. 958; in French and English. U. S. Treaties in Force, 1899, p. 691.

The two articles are:

I. Expenses of International Bureau.
II. Ratification; duration.

V. CONVENTION FOR PROTECTION OF SUBMARINE CABLES.

Concluded March 14, 1884; proclaimed May 22, 1885. 24 Stat. at L., p. 989; in French with English translation. U. S. Tr. and Con. 1889, p. 1176. U. S. Treaties in Force, 1899, p. 693.

(The text in both treaty volumes is from the proclamation of the President attached to the original in the French language, submitted to the Senate.)

The seventeen articles are:

I. Application of convention.
II. Punishment for injuries to cables.
III. Requirements for cable laying.
IV. Payment for repairs.
V. Rules for ships laying cables.
VI. Vessels to avoid cables.
VII. Losses from cables.
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VI. DECLARATION RESPECTING THE INTERPRETATION OF ARTICLES II AND IV OF THE CONVENTION OF MARCH 14, 1884, FOR THE PROTECTION OF SUBMARINE CABLES.

Signed December 1, 1886; proclaimed May 1, 1888. 25 Stat. at L., p. 1424; in French and English. U. S. Tr. and Con. 1889, p. 1184. U. S. Treaties in Force, 1899, p. 700.

This declaration was submitted and finally adopted by a protocol found at p. 1183 of U. S. Tr. and Con. 1889.

VII. FINAL PROTOCOL OF AGREEMENT BETWEEN THE UNITED STATES AND OTHER POWERS FIXING MAY 1, 1888, AS THE DATE EFFECT OF THE CONVENTION OF 1884, FOR THE PROTECTION OF SUBMARINE CABLES.

Signed July 7, 1887; proclaimed May 1, 1888. 25 Stat. at L., p. 1425; in French and English. U. S. Tr. and Con. 1889, p. 1184. U. S. Treaties in Force, 1899, p. 701.

VIII. CONVENTION FOR INTERNATIONAL EXCHANGE OF OFFICIAL DOCUMENTS, SCIENTIFIC AND LITERARY PUBLICATIONS.

Concluded March 15, 1886; proclaimed January 15, 1889. 25 Stat. at L., p. 1465; in French and English. U. S. Treaties in Force, 1899, p. 702.

(The text in both treaty volumes is reprinted from the translation made in the Department of State and proclaimed by the President with the original treaty, which is in the French language.)

The ten articles are:

I. Bureaus of exchanges to be established.
II. Publications to be exchanged.
III. Lists to be printed.
IV. Number of copies.
V. Transmission of documents.
VI. Expense of transmittal.
VII. Publications of learned associations.
VIII. Application of convention.
IX. Adhesion of other States.
X. Ratification; duration.

IX. CONVENTION FOR THE IMMEDIATE EXCHANGE OF OFFICIAL JOURNALS, PARLIAMENTARY ANNALS, AND DOCUMENTS.

Concluded March 15, 1886; proclaimed January 15, 1899. 25 Stat. at L. p. 1469; in French and English. U. S. Treaties, in Force, 1899, p. 704.

The three articles are:

I. Immediate exchange of official journals, parliamentary annals, documents.
II. Adhesion of other states.
III. Ratification; duration.

X. GENERAL ACT FOR THE REPRESSION OF AFRICAN SLAVE TRADE.

Signed July 2, 1890; ratification deposited with Belgian Government February 2, 1892; proclaimed April 2, 1892. 27 Stat. at L., p. 886; in French and English. U. S. Treaties in Force, 1899, p. 706.

(The original of this treaty is in the French language and the text given in the treaty volumes is from the translation submitted to the Senate and attached to the proclamation.)

The one hundred articles are:

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XI. CONVENTION CONCERNING THE FORMATION OF AN INTERNATIONAL UNION FOR THE PUBLICATION OF CUSTOMS TARIFFS.

Signed July 5, 1890; proclaimed December 17, 1890. 26 Stat. at L., p. 1518; in French and English. U. S. Treaties in Force, 1899, p. 733.

The fifteen articles are:

I. International Union formed.
II. Object.
III. International Bureau.
IV. Bulletin to be published.
V. Personnel of Bureau.
VI. Language to be used.
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XII. CONVENTION REGULATING THE IMPORTATION OF LIQUOR INTO AFRICA.

Signed June 8, 1899; adhesion of the United States declared February 1, 1901; proclaimed February 6, 1901. 31 Stat. at L., p. 1915; in French with a translation in English.

This convention was concluded by Germany, Belgium, Spain, Congo State, France, Great Britain, Italy, Netherlands, Portugal, Russia, Sweden and Norway, and Turkey; all but Turkey ratified it; and Denmark, Persia, Austria and Liberia had acceded to it.

The five articles are:

I. Import duties on liquors.
II. Excise duties.
III. Reservation.
IV. Ratifications.
V. Effect.

XIII. DECLARATION PROHIBITING LAUNCHING PROJECTILES FROM BALLOONS.

Signed at The Hague July 29, 1899; proclaimed November 1, 1901. Published in leaflet by the State Department in the original French with an English translation.

This declaration was signed by the United States, Germany, Austria, Belgium, China, Denmark, Spain, Mexico, France, Greece, Italy, Japan, Luxembourg, Montenegro, The Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria, to forbid launching projectiles from balloons for a period of five years.

XIV. CONVENTION REGULATING MARITIME WARFARE.

Signed at The Hague July 29, 1899; proclaimed November 1, 1901. Published in leaflet by the State Department in the original French with an English translation.

This convention was signed by the United States, Germany, Austria, Belgium, China, Denmark, Spain, Mexico, France, Great Britain, Greece, Italy, Japan, Luxembourg, Montenegro, The Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria.

The fourteen articles are:

I. Military hospital ships exempt from capture.
II. Also private hospital ships.
III. Also hospital ships of neutrals.
IV. Control of hospital ships by belligerents.
V. Marks and flag of hospital ships.
VI. Other neutral vessels.
VII. Protection of religious and hospital staff.
VIII. Protection of captured sick.
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XII. Ratifications.
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XV. CONVENTION FOR SETTLING INTERNATIONAL DISPUTES.

Signed at The Hague July 29, 1899; proclaimed November 1, 1901. Published in leaflet by the State Department in the original French with an English translation.

This convention was signed by the United States, Germany, Austria, Belgium, China, Denmark, Spain, Mexico, France, Great Britain, Greece, Italy, Japan, Luxembourg, Montenegro, The Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria.

The sixty-one articles are:

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I. Object of the convention.

TITLE II. *On good offices and mediation.*

II. Mediation of friendly powers.
III. Right to offer mediation.
IV. Duty of mediator.
V. Termination of mediation.
VI. Mediation advisory, not binding.
VII. Mediation not to affect warlike preparation or hostilities.
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TITLE III. *On international commissions of inquiry.*

IX. Commissions to investigate questions of fact.
X. Form of convention, functions of commissions.

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TITLE IV. *On international arbitration.*

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NOTE ON THE HAGUE TREATIES.

The three last preceding general treaties (Nos. XIII, XIV and XV) were the result of the International Peace Conference, held at The Hague in 1899. This Conference determined that none of the treaties should take effect until a certain number of the signatory powers had ratified it and such ratifications had been deposited at The Hague; this explains the lapse of over two years between their signature and proclamation.

The official account of this Conference is given in: Conference Internationale de la Paix, La Haye 18 Mai-29 Juillet, 1899. Ministère des Affairs Etrangères, La Haye. Inprimerie Nationale, 1899. A full account of the Conference is also given in: The Peace Conference at The Hague, and its Bearings on International Law and Policy, by Frederick W. Holls, D. C. L., a member of the Conference from the United States of America. The Macmillan Company, 1900.

POSTAL CONVENTIONS AND UNIONS.

Postal conventions have not been included in the foregoing APPENDIX. The United States has been a party to many such with separate nations and these will be found in the Statutes at Large. These are practically superseded by the "Universal Postal Union" (30 Stat. at L., p. 1629; in French with an English translation), proclaimed June 18, 1897, to which nearly every nation in the world is a party, and which in terms abrogates all previous conflicting postal conventions. The nations which are parties to this "Union" can be ascertained by examining the list at its beginning. Parcels-posts conventions are now being negotiated by the United States with foreign powers separately.

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